No. 87-578
No. 87-602

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

WILLIAM KILPATRICK, ET. AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

VOLUME I OF II, PAGES JA 1 TO JA 90

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PETITION FOR CERTIORARI FILED No. 87-578 OCTOBER 9, 1987
PETITION FOR CERTIORARI FILED No. 87-602 OCTOBER 13, 1987
CERTIORARI GRANTED JANUARY 11, 1988

JOINT APPENDIX
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Excerpts from Grand Jury Transcripts

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Mendrop	1/16/81	1: 31 p.m.	2	91
Raybin	1/16/81	1: 33 p.m.	2	91
			38-39	91
Snyder	2/21/81	9:40 p.m.	2	92
			3	92–93
			6	93
			7	93-94
			11	94
Snyder	3/4/81	11: 10 a.m.	4	94-95
Snyder	7/8/81	8: 39 a.m.	8	95
			9	95-96
			10	96-97
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			13	97-98
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			18	98
			20-21	99
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Name	Date	Time	Transcript Page	Joint Appendix Page
Raybin	7/8/81	9: 11 a.m.	2	100
			3	100-101
			4	101
			24	101
			25	101-102
			26	102
			27	102-103
			28	103-104
			29	104
			30	104-105
			31	105-106
			32	106
			33	106-107
			34	107-108
			35	108
Snyder	7/8/81	10: 50 a.m.	4	108
			5	108-109
			6	109
			8	109
Snyder	7/8/81	12: 05 a.m.	5	110
Mendrop	7/8/81	12:14 p.m.	2	110
Mendrop	8/4/81	9: 25 a.m.	2	111
			3	111-112
			4	112
Snyder	8/5/81	3: 30 p.m.	5	113
Snyder	8/5/81	4: 11 p.m.	3-4	113
Mendrop	9/9/81	8: 44 a.m.	2	113
Snyder	9/9/81	10: 00 a.m.	2	113-114
Raybin	9/9/81	10 :02 a.m.	2-4	114
			5	115

Name	Date	Time	Transcript Page	Joint Appendix Page
Snyder	9/9/81	10: 15 a.m.	2	115
Snyder	10/6/81	10: 58 a.m.	2	115-116
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			12	116-117
Gatliff	11/3/81	10: 30 a.m.	29	117
			30	117-118
			31	118-119
			32	119
Mendrop	11/3/81	2: 23 p.m.	2	119
Raybin	11/3/81	3:32 p.m.	2	119-120
Mendrop	11/4/81	10: 15 a.m.	2	120-121
			3	121
Mendrop	11/4/81	10: 34 a.m.	2	121-122
Blondin	1/5/82	9:09 a.m.	2	122
			3	122-123
			4	123-124
			5	124
			6	124-125
			7	125
			8-9	126
			10	126-127
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Name	Date	Time	Transcript Page	Joint Appendix Page
Hoff	1/5/82	9: 59 a.m.	2	132-133
			3	133-134
			4	134
Major	1/5/82	11: 13 a.m.	2	134-135
			3	135
			4	135-136
			5	136
Blondin	1/7/82	2: 56 p.m.	2	136-137
Blondin and Snyder	2/1/82	10:40 a.m.	4	137-138
			5	138
			8	138
			10	138
Raybin and Mendrop	2/1/82	11: 13 a.m.	2	139
McManus	2/2/82	1: 07 p.m.	3	139-140
			4	140
Plocus	2/2/82	1: 14 p.m.	2	140-141
			3	141-142
			4	142
Warren	2/2/82	1: 20 p.m.	3-4	143
Snyder	2/2/82	1: 07 p.m.	5	144
			6	144-145
			7	145-146
			8	146
			9	146-147
			10	147-148
			11	148
			12	148-149
			18	149
Raybin and Mendrop	2/2/82	1: 47 p.m.	2	149

Name	Date	Time	Transcript Page	Joint Appendix Page
D'Amico	2/4/82	12: 35 p.m.	5	149
			6	149-150
			7	150
			8	150-151
Raybin and Mendrop; Snyder	2/4/82	3: 30 p.m.	2	151-152
			3	152
			4	152-153
Snyder	3/2/82	9: 13 a.m.	2	153
Drizin	3/2/82	9: 29 a.m.	2	153
			3	153-154
			4	154
Jacobson	3/2/82	9: 34 a.m.	3	154
			4	154-155
Snyder	3/2/82	10: 04 a.m.	2	155
Snyder	3/2/82	2: 56 p.m.	4	155
			5	156
			6	156-157
			7	157-158
Counter	3/2/82	4: 04 p.m.	3-4	158
Blondin	4/6/82	9: 08 a.m.	4	158-159
			8	159
Burke, Mendrop, and Shea	4/6/82	1: 30 p.m.	2	160
Burke, and Shea	4/7/82	11: 21 a.m.	2	160
Blondin, Burke, and Shea	4/7/82	11: 48 a.m.	2	160-161
			3	161
Burke, and Shea	4/7/82	1: 29 p.m.	2	161-162

Name	Date	Time	Transcript Page	Joint Appendix Page
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			22	165
			23	165-166
Mendrop	5/3/82	1: 11 p.m.	2	166
Snyder	5/3/82	1: 39 p.m.	2	166-167
			3	167-168
			4	168-169
			5	169
			13	169
Snyder	7/19/82	9: 08 a.m.	5	169-170
			6	170-171
			7	171
			9	171
O' Donnell	7/19/82	1: 14 p.m.	122-123	171
Snyder	7/19/82	2: 45 p.m.	2	172
			3	172-173
			4	173
Bell	7/20/82	9: 12 a.m.	2	173
			3	173-174
			8	174
			9	174-175
			10	175
Snyder	9/29/82	8: 52 a.m.	2	175
			3	175-176
			5	176
			7	176
			8	176-177
			9	177
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Name	Date	Time	Transcript Page	Joint Appendix Page
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			13	178-179
			14	179
			15	179-180
			16	180–181
			18	181
Mendrop	9/29/82	9: 32 a.m.	2-3	181
			22	181-182
			23	182
			24	182-183
			25-26	183
			49	183-184
			50	184
			51	184-185
			52	185
			54	185-186
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			56	186-187
			57	187
			62	187-188
			64	188
			65	188-189
			66	189
			67	189-190
			68	190
			72	190
Blondin and Snyder	9/30/82	9: 07 a.m.	3	190-191
			4	191-192
			5	192
			10	192
			11	192-193
			12	193-194

Citations To Appendices To Petitions For Certiorari

	Bank of Nova Nova Scotia Petition	Kilpatrick et. al. Petition
Opinion of the United States Court of Appeals for the Tenth Circuit (821 F.2d 1456) dated June 18, 1987	A1–A41	4a–48a
Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing dated August 19, 1987	B1–B3	la–3a
Opinion of the United States District Court for the District of Colorado (594 F. Supp. 1324) dated September 24, 1984 *("Kilpatrick II")*	C1–C55	49a–108a
Opinion of the United States District Court for the District of Colorado (575 F. Supp. 325) dated August 25, 1983 *("Kilpatrick I")*	D1–D35	121a–156a
Opinion of the United States Court of Appeals for the Tenth Circuit *Blondin v. Winner*, (822 F. 2d 969) dated July 20, 1987		109a–120a
Rule 28.1 Listing of Parents, Subsidiaries and Affiliates of The Bank of Nova Scotia	E1	
Constitutional Provision and Federal Rules of Criminal Procedure	F1–F3	
18 U. S. C §§ 6002, 6003		157a-159a

Relevant Docket Entries, U.S. District Court

• • • • •

9/30/82 Indictment

11/10/82 Def't.'s Demand for a Speedy Trial . . . com
MOTION of Def't. to Dismiss Ct. XXVII of the Indictment . . . com
Memorandum of Law in Support of Def't.'s Motion to Dismiss Ct. XXVII of the Indictment . . . com

• • • • •

11/26/82 MOTION of Def't. for Bill of Particulars . . . com
MOTION of Def't. to Dismiss for Failure to State an Offense . . . com
MOTION of Def't. to Dismiss for Prosecutorial Misconduct . . . com
MOTION of Def't. to Review Transcripts of GJ Proceedings . . . com
MOTION of Def't. Authorizing Interview of Grand Jurors . . . com
Memorandum Brief in Support of Def't.'s Motion to Dismiss for Prosecutorial Misconduct . . . com

• • • • •

2/4/83 Govts. Response to Motion of Def't. To Dismiss . . . Failure to State Offense.
Govts. Response to Def'ts., MOtions for Order authorizing interview of Grand Jurors; for Disclosure of Grand Jury Transcripts, and To Dismiss for Pros. Misconduct.

• • • • •

2/21/83 Hearing-(JLK) Pending Motions Ordered: Motion to Dismiss Counts I and II are GRANTED. Counsel are to determine how they wish to proceed on remaining counts by end of day Wednesday 2-23-83. Or-

dered: Motion to Dismiss Nova Scotia is GRANTED.

• • • • •

2/23/83 Minute Order . . . (JLK) The Government's Motion for a Written Order regarding Judge Kane's Oral Orders of 2/21/83 is DENIED.
Signed . . . (JLK) Order . . ORDERED: Counts III through XXVI are dismissed as well as Counts I and II of the Indictment and the hearing set for Saturday, 2/26/83 is vacated and, within ten days the def't. may renew previously filed motions or file additional motions as related to the remaining Count XXVII The trial on Count XXVII will be set without delay.

• • • • •

3/17/83 NOTICE OF APPEAL filed by pltf from Order of 2/23/83 . . . designation conf set 3/24/83 at 4:15 pm in C-161 . . . trans order due 3/28/83 . . . letter sent to all counsel of record 3/18/83 . . . no fees required

5/2/83 TRIAL TO JURY (FMW) 1st Day. . . Jurors sworn (Def't Dilpatrick on Count 27.)

5/3/83 TRIAL TO JURY (FMW) 2nd Day (Def't Kilpatrick on Count 27.)

5/4/83 TRIAL TO JURY (FMW) 3rd Day (Def't Kilpatrick on Count 27.)

5/5/83 TRIAL TO JURY (FMW) 4th Day (Def't Kilpatrick on Count 27.)

5/6/83 TRIAL TO JURY (FMW) Fifth Day (Def't Kilpatrick on Count 27.)

5/9/83 TRIAL TO JURY (FMW) Sixth Day (Def't Kilpatrick on Count 27.). . . Jury returns to continue deliberations . . . ORDERED: Def't. to have 30 days to file post-trial motions and briefs. . . The Government to have 10 Days thereafter to file a response. . . The matter will then be set for hearing. . . ORDERED: Bond Continued. . . Jury returns with a Verdict finding the defendant GUILTY as charged in Count 27.

• • • • •

6/20/83 MOTION of Defendant for Government Misconduct
Brief In Support of Motion to Dismiss for Government Misconduct
Affidavit of William C. Waller, Jr.
Affidavit of Richard K. Rufner
Affidavit of Mildred D. Reeves
Affidavit of Declan J. O"Donnell
Affidavit of Donald A. Moorison

• • • • •

6/20/83 MOTION of Defendant for Judgment of Acquittal or in the Alternative for an Order Granting a New Trial.

• • • • •

6/24/83 Notice of Hearing . . . (FMW) You are advised that a hearing on all post trial motions has been set at 9:00 a.m. on July 12, 1983 in C-502.

• • • • •

7/11/83 Signed . . . (FMW) Ordered that the government may file written responses on or before August 1, 1983 but the evidentiary hearing will commence as scheduled on July 12, 1983. Counsel has been advised by letter that it is unlikely that the evidentiary hearing can be concluded this week, and if more testimony is needed later, another date will be set.

7/11/83 Government's Responses to Defendant's Motions (1) To Dismiss for Government Misconduct, (2) For Judgment of Acquittal or in the Alternative for an Order Granting a New Trial, and, (3) For Authorization to Take Deposition of Wilson Quintela at Government Expense

• • • • •

7/12/83 HEARING (FMW) Defendant's Post Trial Motions

• • • • •

7/13/83 HEARING (FMW) Post Trial Motions (2nd Day) Mr. Anderson of Justice dept replaces Mr. Snyder, Blonding and Scharf . . . Witnesses . . . Exhibits . . . Court in recess to 7/14/83.

7/13/83 NOTICE OF HEARING (FMW) Post Trial Motions to be heard 8/16/83 at 1:30.

7/14/83 Signed (FMW) Order . . . Grand Jury Transcripts to be reviewed by Judge Winner.

• • • • •

7/14/83 HEARING (FMW) Post Trial Motion (3rd Day) . . . Witnesses . . . Exhibits . . . Court in recess to 10:00 a.m. tomorrow.

7/15/83 HEARING (FMW) Post Trial Motion (4th Day) . . . Witnesses . . . Exhibits . . . Ordered: Hearing cont. to 8/16/83.

8/1/83 MOTION of Govt. to Seal Govts. Brief in Response to Court's order of 7/15/83.
MOTION of Govt. for Order Authorizign Disclosure fo Grand Jury Material.
Def'ts. Opening Brief Re: Prosecutorial Misconduct.

• • • • •

8/9/83 MANDATE of C/A . . . partial remand for this Court to hold further hearings and for findings and conclusions which may be related to this appeal . . . Ordered: on conclusion of such further proceedings this Court is to transmit a supplemental record of the additional findings, conclusions and orders made with respect to the allegations of prosectorial misconduct . . . the C/A will consider the consolidation of any further appeals from any orders following such hearings by this Court . . . except for the partial remand the C/A retains juris. for final disposition of the merits following this partial remand Record rec'd from C/A . . . VOLS I-VI and SUPP VOL. I-II

8/9/83 NOTICE OF HEARING (FMW) . . . in accordance w/mandate of 10th Circuit further hearing is set 8/16/83 at 9:00 a.m. in C-200 . . . com

• • • • •

8/16/83 HEARING POST TRIAL MOTIONS (FMW) . . . Ordered: every def't will be deemed joined in def't. Kilpatrick's Mtn to Dismiss the Indictment w/ leave to file a formal motion to that effect . . .

• • • • •

8/17/83 HEARING POST TRIAL MOTIONS (FMW) 2nd day . . .

• • • • •

8/31/83 MOTION by Kilpatrick Pursuant to Rule 6 (e) (3) (c) (ii)

• • • • •

9/6/83 Motion by Gov't to Withdraw Memo. Opinion of 8/25/83 or in Alternative to Amend Such Opinion to

Delete all References to Names of Prosecutors and all Information that Identifies THem
Memo in Support of Motion to Withdraw Opinion of 8/25/83
Motion by Gov't for Reconsideration of the Court's Order of 8/25/83 for an Order Denying Def't. Kilpatrick's Motion for New Trial Brief in Support of MOtion for Reconsideration . . . New Trial

9/7/83 Sgd (FMW) ORDER . . . DENYING gov't Motions to Withdraw memorandum opinion of 8/25/83 and Motion for reconsideration of the Order of 8/25/83 and for an Order denying def't. kilpatrick's motion for new trial . . . com

9/9/83 GOV'T RESPONSE to Def't. Kilpatrick's Motion for Disclosure of Grand Jury Transcripts

9/14/83 STATUS CONF (JLK) . . . statements of counsel . . . Ordered: Ct. to receive all transcripts on G.J. proceedings and before FMW . . . Counsel to advise what trans. may be used by the Ct . . . on or before 10/3/83 counsel to inform Ct. what prior testimony can be offered . . . on or before 10/3/83 counsel to inform Ct. what witnesses to be called and approx. time for direct testimony . . . on or before 10/3/83 counsel to submit exhibits and list . . . w/i 10 days counsel to submit stipulation on any matters that may be shorten hrg

• • • • •

9/16/83 NOTICE OF APPEAL filed by the Gov't from Order of Court 9/7/83 . . . designation conf set 9/29/83 at 2:00 pm . . . transcrpt order form due 9/29/83 . . . GOV'T APPEAL—NO FEES REQUIRED . . . letter sent to counsel of record and def't 9/19/83
NOTICE OF APPEAL filed by the Gov't from Order of Court Denying Gov't Motion to W/D Memo. &

Opinion of 8/25/83 . . . designation conf set 9/29/83 at 2:00 pm . . . transcript order form due 9/29/83 . . . GOV'T APPEAL—NO FEES REQUIRED . . . letter sent to counsel for record and def't 9/19/83

• • • • •

10/12/83 NOTICES OF APPEAL DOCKETED BY CIRCUIT COURT . . . CASE NOS. 83-2284 and 83-2285 ASSIGNED

• • • • •

10/25/83 Transmittal to Tenth Circuit of SUPP VOLS I-VI . . . trial transcripts . . . for Record on Appeal in 83-2284
MANDATE OF C/A in 83-2285 . . . on Motion of Appellant the appeal is DISMISSED . . . com . . in re: "new trial motion for reconsideration"
Receipt from C/A for SUPP. VOLS I-VI in 83-2284

• • • • •

11/10/83 Minute Order (JLK) . . . at hrg 11/17/83 on def'ts' motion to dismiss the indictment def'ts as movants will present evidence first . . . all parties are to notify the Court prior exactly what portions of transcripts of previous hearings will be introduced in lieu of live testimony . . . a list of live witnesses and time required for direct exam are to be submitted . . . def'ts and pltf are to advise the Court of any testimony by telephonic conference is anticipated . . . all such information shall be provided to the Court not later than 11/15/83 . . . com

• • • • •

11/17/83 PENDING MOTIONS (TRIAL TO COURT) . . (JLK) . . . Ordered: Court Reporter to inform

the U.S. Atty and the Court by 11/23/83 when all transcripts will be prepared . . . def'ts' witness . . . recess

11/18/83 PENDING MOTIONS CONT'D (JLK) . . . witness . . . exhibits . . . recess

11/22/83 PENDING MOTIONS CONT'D (JLK) . . . def't's witness . . . exhibits . . . recess

11/23/83 PENDING MOTIONS CONT'D (JLK) . . . def't's will file documents from bankruptcy Court for judicial notice . . . Def't's rest . . . three day estimate for Plaintiff's case . . . recess

12/7/83 NOTICE OF HEARING (JLK) hearing on pending motions to resume on 12/13, 14 & 15, 1983 at 9:00 am . . . com

• • • • •

12/13/83 CONT'D HEARING ON MOTIONS (JLK) . . (Trial to Court) . . . pltf's witnesses . . . exhibits . . . recess

12/14/83 CONT'D HEARING ON MOTIONS (JLK) . . (Trial to Court) . . . pltf's witnesses . . . exhibits . . . recess

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12/15/83 CONT'D HEARING ON MOTIONS (JLK) . . (Trial to Court) . . . pltf's witnesses . . . exhibits . . . recess.

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1/4/84 ORDER FROM C/A . . . on emergency motion of gov't that West Pub. Co. be directed not to publish D.C. memo. opinion of 8/25/83 in perm. bound volume of F. Supp. identified as 570 F. Supp. 505 it is

ORDERED: West Pub. Co. ordered to dely temporarily publication of said opinion and **FURTHER**: def'ts/appellees to file response to said emergency motion on/before 1/13/84 showing cause why said temporary stay should not be made permanent

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2/6/84 CONT'D HEARING ON MOTIONS (JLK) . . . statements by govt counsel re: letters of Assurance . . . witnesses and exhibits . . . recess

2/7/84 CONT'D HEARING ON MOTIONS (JLK) . . . witnesses and exhibits . . . certain exhibits offerred/received conditionally on further showing that allegations can be met . . . govt may move for reconsideration . . . recess

2/8/84 CONT'D HEARING ON MOTIONS (JLK) . . . ORDER: on motion of def't counsel Robert Anello admitted *pro hoc vice* for this hearing . . . witness and exhibit . . . oral statement/motion by def't counsel that certain testimony be stricken DENIED. . . ORDER: Def'ts' have 40 days to file their post Findings of Fact & Conclusions . . . govt has 20 days after receipt to file Response . . . def'ts' have 10 days after receipt of response to reply . . . hearing recessed

9/24/84 Sgd (JLK) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER . . . after findings and conclusions it is ORDERED: the indictment is dismissed because of totality of circumstances which include numberous violations of Rule 6(d) and (e) FRCrP, violations of 18:6002 and 6003, violations of the 5th and 6th Amendments to the US Constitution knowing presentation of misinformation to the grand jury and mistreatment of witnesses . . . com . . . eod 9/25/84

Relevant Docket Entries, U.S. District Court

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10/24/84 NOTICE OF APPEAL filed by Govt. from Order of this Court on Sept. 24, 1984 . . . designation conf set at 8:30 am on 10/31/85 . . . transcript order form due 11/3/84 . . . GOVT APPEAL REQUIRES NO FEES . . . letter sent to all counsel and def'ts 10/25/84

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10/27/87 Notice from the Court of Appeals that a petit. for writ of certiorari was filed in the Supreme Court and assigned case #87-602

1/25/88 Letter from the C/A advising that the petition for writ of certiorari filed in this case was GRANTED by an order of the Supreme Court dated 1/11/88

Relevant Docket Entries, U.S. Court Of Appeals

3/21/83 CS.DKT. Case docketed

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7/27/83 M.RMD., CS.SUBM Appellee's motion to remand case submitted to panel

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8/8/83 M.RMD.CS.DISP Granted appellee's motion to remand case partially Holloway, Seymour, Bohanon (parties served by mail) Order case partially remanded to d.c. for further hearings on conclusion of which the d.c. is ordered to file supplemental record of findings, conclusions and orders re prosecutorial misconduct—Holloway, Seymour, Bohanon (parties, d.c. served by mail.)

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12/29/83 M.F.ANY.F. Appellant's emergency motion for order to postpone publication of District Court's opinion filed, orig., cs (83-2284).

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1/3/84 M.F.ANY.DISP. Granted appellant's emergency motion in 83-2284 for order to postpone publication of district court's opinion disposed of by Holloway, Seymour, Bohanon (parties served by mail)

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4/10/85 O.CS.CON Order cases 83-1363 through 83-1369, 83-2284, 84-1231, 84-2481 through 84-2487 consolidate for all further appellate proceedings disposed of by Holloway. Parties served by mail.

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7/23/85 M. SUP.ROA.F/SUBM.Appellant's (government) motion to supplement record with supporting memo filed & submitted to panel.

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6/18/87 OPN.F Published, signed opinion filed—Holloway, Seymour, Bohanon Writing Judge is Holloway. (parties served by mail)
DIS.OPN.F Published, dissenting opinion filed by Seymour. (parties served by mail)
JM.DISP Judgment is reversed. The cause is remanded to the district court for further proceedings in accordance with the opinion of the court.

7/20/87 OPN.F Published, signed opinion filed—Holloway, Seymour, Bohanon Writing Judge is Seymour. (No. 83-2284). (Parties served by mail)
JM.DISP Judgment is appeal dismissed. (No. 83-2284)
MDT.ISS Mandate issued to district court. (No. 83-2284).
OPN.F Published, signed opinion filed (combined with above opinion). (No. 84-1231)
JM.DISP Petition for writ of mandamus is denied.
ISS.CC.O Issued certified copy of judgment to district court. (No. 84-1231)
CASE CLOSED.

7/27/87 MDT.RCPT.F Mandate receipt filed in 83-2284.

8/3/87 P.REHRG.ENB.F Appellant's petition for rehearing enbanc filed, + 12cc, C/S.

8/4/87 P.REHRG.ENB.SUBM Appellant (Lerner) petition for rehearing submitted to panel.

8/3/87 P.REHRG.ENB.F Appellee's (O'Donnell) petition for rehearing filed, orig + 11cc, C/S.

8/4/87 P.REHRG.ENB.SUBM Appellee's (O'Donnell) petition for rehearsing filed 8/3/87, submitted to panel.

8/3/87 P.REHRG. ENB.F Appellee's (Bank of Nova Scotia, Kilpatrick and Alberga and Gill) petition for rehearing en banc filed, Orig + 12cc, C/S.

8/4/87 P.REHRG. ENB.SUBM Appellee's (Bank of Nova Scotia, Kilpatrick and Alberga and Gill) petition for rehearing en banc filed 8/3/87 submitted to panel.

8/19/87 P.REHRG.ENB.DISP Appellee's (Kilpatrick, O'Donnell, Lerner, Bank of Nova Scotia, Alberga and C.S. Gill) petition for rehearing en banc filed, 8/3/87,— Denied Holloway, Logan, Seymour, Anderson, Tacha, Baldock. (parties served by mail). Case Nos. 83-1363 - 83-1368; 84-2481 - 84-2486.

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9/3/87 M.STAY.ISS.MDT.DISP Appellees' motion to stay issuance of mandate pending certiorari, granted—Holloway, Seymour, Bohanon. (parties served by mail) Mandate stayed through 10/3/87. THE COURT WILL NOT FAVOR FURTHER MOTIONS TO STAY ISSUANCE OF THE MANDATES.

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10/19/87 P.WRIT.CERT.F Appellee (Bank of Nova Scotia) petition for writ of certiorari filed 10/9/87, has been assigned Supreme Court #

10/22/87 P.WRIT.CERT.F Appellee (Kilpatrick) petition for writ of certiorari filed 10/9/87 has been assigned Supreme Court # 87-603.

11/02/87 P.WRIT.CERT.F Blondin (84-1231) petition for writ of certiorari filed 10/19/87. Supreme court no. is 87-646.

Relevant Docket Entries, U.S. Court Of Appeals

1/15/88 P.WRIT.CERT.DISP Appellee (Bank of Nova Scotia) and (Kilpatrick) Nos. 83-1363-69 & 84-2481-87 petition for writ of certiorari filed 10/19/87 has been granted.

1/19/88 P.WRIT.CERT.DISP Petition for writ of certiorari filed in No. 84-12 (mandamus) denied by Supreme Court on 1/11/88.

Excerpts from Kane Hearing Transcripts

DIRECT EXAMINATION
BY MR. NESLAND

(38) *** Q. Why was Jerry Shea listed? **[IRS Agent Paul Raybin]** A. Jerry Shea is a special agent with the Criminal Investigation Division and was assisting us in doing analyses (39) of bank records and he also assisted in doing the computer indexing of all the documents in the case.

Q. Keypunching? A. It wasn't keypunching. The information was handwritten down on flow chart paper, just computer paper, and that information was later keypunched.

Q. Who did the keypunching? A. Keypunching was done some by computer keypuncher in Ogden, Utah, where the I.R.S. has its computer group, and some by computer technicians in Dallas, Texas.

* * * * * *

(48) *** Q. So as I understand it, what happened was that you knew that the civil examination division had pulled together a substantial number of the tax returns of investors in the UFO program; is that correct? A. That's correct.

Q. And you made a request for them to turn those tax returns over to the grand jury or to the I.R.S. C.I.D. or who? A. The request was made from I.R.S. C.I.D. in Denver for the returns to be sent to I.R.S. C.I.D. Denver. Those returns as of the time I left were being maintained by I.R.S. C.I.D. Denver.

Q. All right. A. It was not a grand jury request.

Q. All right, so they were not placed in the grand jury room, they were simply, at least the last you knew, they were in the C.I.D. offices here in Denver? A. That's correct.

(49) Q. But as I understand your testimony, from those tax returns you made a selection of investors to interview? A. I don't know whether that's a fair statement. I don't recall whether the

selection was made as a result of —we had less through the grand jury investigation of all the investors and the places where they were and the amount of deductions they contained. I would think a more fair statement would be that we reviewed the deductions taken by different individuals and chose a select group of people in three different cities for those interviews; of course, four cities if you include Denver.

Q. All right, and who made that selection, you and Agent Mendrop? And who did the mechanical selection part of going through the list? A. I believe the mechanical selection was done by Mr. Mendrop and I.

Q. And you chose four cities? In other words, you just look— A. Yes.

Q.—look at the list and if somebody fell in a particular city, you may or may not be selected for interviewing? A. Seems to me there were five cities. The reason people were chosen or the cities were chosen was primarily a result of large groups of investors from a wide variety of programs living in that one area so it was more cost effective to send two agents to that city so they could do a number of different (50) interviews and cover a number of different programs all in one trip.

Q. Okay. Can you give me the name of the five cities? A. Houston; I believe Phoenix, Arizona; Los Angeles; Las Vegas; and Denver is the other city where the investors were interviewed.

Q. Do you have any idea how many investors were learned through the grand jury independent of those that you testified were learned through the civil examination division? A. I think the only ones would have been investors in the 1980 methanol program.

Q. Would there be a mix there, some of them would have been learned only through the grand jury and some of them would have been learned through the civil examination division audit? A. I believe all the names of the 1980 investors would have been learned though the grand jury investigation for the purposes of

my knowledge. I don't know what the examination division got on its—

Q. I'm just asking for your knowledge. A. I don't know what the examination division did. I know that's how we, as a result of — that's how the government in the criminal investigation became aware of the 1980 investors.

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(52) *** Q. Did you make the selection of the individuals and then request the tax returns of only those selected individuals or did you just simply request all the tax returns for all of the investors that you were aware of? A. I believe in general we—all the tax returns that the civil examination division had under its control in its civil audit, in its control of investors in the coal program and the (53) methanol program, we made specific request for the examination division to provide us with all of those returns.

Q. And you earmarked the group that you knew had those tax returns under their control so that you wouldn't have to apply to every district; you knew that they were in a particular area and had been obtained by a particular group that was doing this particular audit before the grand jury started? A. Yes, I was not actively involved in the requesting of returns. Mr. Bandy was overseeing that and that was being handled—Miss West participated in that significantly, as did Miss Patterson. My best recollection is that initially the Criminal Investigation Division received from the examination division a list of all returns of coal and methanol tax shelter investors that it had under control.

Q. And this occurred sometime around this March 28, 1982 area? A. No, it would have been initiated long before that time, possibly maybe as early as January, maybe even as early as before that.

Q. Before the grand jury commenced? A. No, no, after the grand jury.

Q. After the grand jury commenced? A. This is a year and three months after the grand jury.

Q. You're saying January of '82 it could have occurred? A. Yes.

Q. As early as January of '82? (54) A. That's correct.

Q. Do you have a recollection as to whether or not requests were made for the 1980 investor tax returns? A. I just have no specific recollection on that point.

Q. You were involved, were you not, in selecting the investors for interviewing and then going out and conducting interviews? A. Yes, but the two are separate. The selection of people to be interviewed, it's my best recollection, was a separate function from the gathering of returns.

Q. Were you involved in both—you were involved in the selection function? A. Yes, and I was involved to the extent of letting Mr. Bandy know that it was necessary that all returns that were under control be obtained for potential trial use.

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(57) *** Q. And then on October 20, 1982, there is a notice of disclosure which I believe is the first one or the second one in that group that you have marked there as Defendant's Exhibit Q. A. That's correct.

Q. Now, this notice of disclosure occurs approximately one month after the grand jury had returned the indictment in this case; is that correct? A. Yes, that's correct.

Q. Was there a further grand jury hearing other evidence? A. No.

Q. So that the form of this particular notice of disclosure is incorrect in that it says the purpose of providing these persons' names is to assist in the presentation of criminal matters to a grand jury. I assume that's just incorrect? A. I don't think that's incorrect. I think it reflects an after-the-fact filing.

Q. What do you mean by "after-the-fact"? A. That these people would have been involved in assisting with matters prior to this date and as such this is an after-the-fact filing.

Q. Is it fair to say that most of those we've gone through is after the fact; that the people have worked or have been talked (58) to or had discussions or had been consulted and then after the fact you file a notice that disclosure was made to them? Is that how it was done? A. Normally not. There would have been, for the most part—on all those previously named people, there would have been a filing. There would have been a request to the U. S. Attorney's Office for inclusion in this record at or about the time that people were to be involved.

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(67) *** Q. (BY MR. NESLAND) And this particular disclosure list was prepared as a result of your conversation with Mr. Snyder sometime around the end of September when the indictment was returned? A. That timing is my best recollection when it occurred, yes.

Q. And the purpose of it was for you to determine what personnel in I.R.S. had received grand jury information that hadn't been listed yet? A. Primarily, the function was for us to go back through the list, see if we had missed or forgot to put any individuals on (68) the disclosure list, and to make sure that that disclosure was made of individuals who principally had access to grand jury information.

Q. And that was for you, either you or Agent Mendrop, to do that? A. It was our—yes, it was our responsibility to go through the list and make that determination.

Q. So do I understand that what you did was take all of the other disclosure lists we have here and go through them and determine who was on them? A. Who was not on them.

Q. How did you determine who was not on there, who should be on there that wasn't on there? A. By looking to see

who was on and calling people who had some role or some function during the course of the investigation but for one reason or another had not been put on the disclosure list.

Q. So you and Mr. Mendrop just split up the names and either talked to the agent or gave him a telephone call and asked him who, if anybody, worked for him that should have been disclosed and get a master list and figure out who wasn't on it? A. Mr. Mendrop and I went through a stack of documents similar to this and, as a result of going through that, remembered other individuals who had either participated in the investigation directly or had been exposed to the grand jury (69) information as a result of our consultations and that list contains those individuals.

Q. But did you do that—as I understood it, you did that by talking to some of the other agents and calling agents or—A. That's not correct.

Q. All right, so you didn't do that? A. We did this by Mr. Mendrop and I sitting down and looking at this list, and as a result of looking at this list, remembering other individuals who had either assisted in the grand jury investigation directly or who had been involved in the advisory discussion role that we'd mentioned but whom Mr. Mendrop and I had not seen put on the list.

Q. All right. So this list is basically a list of those who you and Mr. Mendrop recall having been involved in some way in the investigation but hadn't been on the previous disclosure lists? A. That's correct.

Q. That's what this represents and even now you don't remember some of them that are on there? A. And that would be—either me not knowing or Mr. Mendrop having had that knowledge that I didn't have.

Q. But what this represents is your recollection of every person who you could recall worked on this investigation and hadn't appeared on any of these lists; that's what this document is, isn't it?

(70) MR. ALEXANDER: I just object to the point that I think we have been repeating on this list and I assume we have covered it.

THE COURT: Well, answer this question and go on to the next one.

THE WITNESS: Could you repeat the question?

Q. (BY MR. NESLAND) I just want to make sure that what this October 20th, 1982 notice of disclosure list is is simply yours and Mr. Mendrop's recollection of persons you could recall as of this time had worked on this investigation or had access to grand jury material that you did not find listed of the previous lists; that's what this document is? A. Yes.

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(74) *** Q. And then those indexes—what happened to the index of the documents, the 10,500 documents? What was done with that index? A. The index in its raw form is merely words on sheets of paper. I think you can put 10 to 20 documents indexed on a given page and within different columns. Those raw pages were then handcarried to Ogden, Utah, I believe, to be keypunched. I believe in some instances they were taken to Dallas to be keypunched and the keypunch cards were handcarried back to Denver.

Q. All right, so they were taken to Ogden, Utah to what, the I.R.S. offices in Ogden? A. To the Ogden Service Center, which has a large computer function capability.

Q. So that those lists were taken to Ogden and then keypunched into the computer in Ogden, Utah? A. No, they were just taken to Ogden, Utah and the raw data was turned into keypunch cards.

Q. All right, who did that? A. A group of people in the computer group, keypunchers, and that was done under the control of a supervisor out there. I don't recall his name.

Q. Was he on the list? (75) A. I don't know whether he's on the list or not. I don't recall seeing his name but I don't recall his name either. Mr. Mendrop would.

Q. What division was he in? A. I don't specifically recall whether he was actually with Criminal Investigation Division in Ogden or whether he was with the manager of the computer section in Ogden.

Q. Do you know how many persons were involved in keypunching? A. No.

Q. And I assume none of their names appear on this list, so far as you know? A. I don't know if their names do appear on this list. I know that the person who is in charge of supervising keypunching, whoever that man was out there, and I don't recall his name, he was advised by Mr. Mendrop in one telephone conversation that I recall to maintain a list of the names of all people who did the keypunching.

Q. But you don't recognize any of those persons as having been on this list— A. I don't think—

Q. —in Defendant's Exhibit Q? A. I don't recall anybody specifically named was from Ogden.

Q. Pardon? A. I don't recall seeing anybody named here that was, whose name was or place of work was Ogden.

* * * * * *

DIRECT EXAMINATION
BY MR. NESLAND

(95) *** Q. Did you inform any of the investors that if they did not interview that they would be subpoenaed to the grand jury? **[IRS Agent Richard Mendrop]** A. Well, I don't remember actually ever doing that. I'm not saying that it wasn't done, but I can't recall an instance where we said that.

Q. Why do you hesitate on that? A. Because it's entirely possible that we may have informed them that if they did not, that they could be subpoenaed. If they either didn't talk to us or chose not to talk to us, it was possible that they could be subpoenaed before the grand jury. Whether we actually said that to someone, I don't recall.

Q. Had you discussed with Mr. Snyder or Mr. Blondin whether or not if an investor refused to interview they would subpoena them? A. We discussed it as a possibility. I don't recall specific instances where they directed us to issue a subpoena to an investor as a result of him not consenting to an interview.

Q. There was some that did not consent to interviews? A. I believe that some of the other agents may have talked to some investors who chose not to be interviewed. I'm not certain about that, though.

Q. And they were not subpoenaed? A. No, sir, I don't believe they were.

Q. Was any investor subpoenaed to appear before this grand jury, not just those that were interviewed successfully or unsuccess (96) fully, but any investor interviewed simply as an investor? A. Well, there was an investor in Southern California out of San Diego who testified before the grand jury, I believe, but I don't know if he was simply invited to come or if he was actually subpoenaed. I presume that he was subpoenaed because a subpoena would have been necessary for him to receive travel reimbursement. There was also one other investor in the Los Angeles area who I believe was subpoenaed to testify, but his role went beyond that of just an investor. I believe he was also an associate or at least a former acquaintance of Mr. Kilpatrick.

Q. I assume that the interviews were recorded in some fashion either by a tape recording machine or by notes taken by the agent? A. Notes?

Q. Notes. A. Yes, sir.

Q. And the interview summaries were prepared? A. In most cases I believe that either notes and/or summaries were prepared. There may have been instances where there was very little information and perhaps no notes were prepared.

Q. Now, you testified before the grand jury on a number of occasions, did you not, Agent Mendrop? A. Yes, sir.

Q. Did you ever present any of those interviews to the grand jury? (97) A. I don't recall having done that.

Q. Do you know whether or not they were ever presented to the grand jury by any witness? A. I don't believe they were.

* * * * * *

(98) *** Q. Would it be fair to say that a substantial number of the investors whose tax returns were requested and received were requested as a result of getting the lists through the grand jury of the investors? A. Not exactly because we had a large number of investors' names prior to the start of the grand jury.

Q. Could you give me a percentage? Not offhand, not without checking into the records.

Q. Wouldn't be none, you wouldn't have had every investor prior to the time— A. I don't believe so, no.

Q. And I assume it's more than one. A. It would be more than one.

Q. What was the purpose of requesting the returns of these investors? A. We wanted to see whether the deductions relating to the investments had been taken on the returns.

(99) Q. For what purpose was that? A. Well, unless deductions had actually been taken, there wouldn't have been any harm to the government in this matter.

Q. How many returns have you compiled through your requests? A. Offhand, I can't give you a figure. I can tell you that

it fills three or four drawers of a large file cabinet. I don't know the exact number.

Q. And those returns are in with the grand jury documents? A. The returns have been kept with the Internal Revenue Service in the offices of the Criminal Investigation Division.

Q. So the tax returns that were requested and received are in the I.R.S. offices? A. That's correct.

* * * * * *

(107) *** Q. Do you know who Julie Tuttle is? A. No, sir.

Q. Do you know who Connie Strombech is, S-t-r-o-m-b-e-c-h? A. Yes, sir.

Q. Who is she? A. She is a tax auditor in the Denver office of I.R.S.

Q. Is that the civil examination division? A. That's correct.

Q. Dale Coffin, C-o-f-f-i-n? A. No, sir.

Q. Barbara Peterson? A. No, sir.

Q. Betty Castaldi, C-a-s-t-a-l-d-i? A. No, sir.

Q. I'll try this next name, Nancy Wasrzyniak, W-a-s-r-z-y-n-i-a-k? (108) A. No, sir.

Q. Patricia Stewart? A. No, sir.

Q. What did Connie Strombech do in this investigation? A. We had several tax auditors who assisted us in computing the tax effect of having invested in these tax shelters. By that I mean that they looked at the tax returns of the investors and computed the tax that was lost to the government by the investor having taken this particular investment.

Q. In other words, you used the tax returns that you previously testified were requested and did a recomputation of the tax due and owing on those returns? A. Yes, sir.

Q. And as I remember, you don't recall how many tax returns were actually recomputed or were requested and returned? A. No, sir, I don't recall right now.

Q. Do you have some idea of the number of tax returns which were recomputed during this process by these tax auditors? A. No, sir, I don't.

Q. Did you receive results of their computation? A. Yes, we did.

Q. Were these divided between the methanol shelters and the coal shelters? A. Well, we differentiated between the two, yes.

Q. So that you recomputed the tax due and owing if you (109) disallowed the deduction for the methanol program and you did the same for the coal program? A. That's correct.

Q. Were the results of that recomputation presented to the grand jury? A. No, sir.

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CROSS EXAMINATION
BY MR. ALEXANDER

(148) *** Q. Now, if you wanted the code today—strike that. With regard to the investor interviews that were conducted, sir, what was the purpose in interviewing those investors, if you would tell us? **[IRS Agent Richard Mendrop]** A. Simply wanted to gather what evidence that might be available from the investors to include any correspondence they had received, any representations that had been made to them, any records that they had that pertained to these tax shelters.

Q. All right, and was there also under consideration by the grand jury potential mail fraud charges? A. Yes, sir. We were interested in any items that had been sent through the mails which would have constituted the basis for mail fraud violation.

* * * * * *

(149) *** Q. Now, can you help us, sir, with regard to why the investor information was not presented to the grand jury? A. That was a decision made by Mr. Snyder and Mr. Blondin.

Q. So they would have to help us in that? A. Yes, sir.

Q. Now again, if I asked you with regard to the tax computations that were prepared, as I understand, they were not presented to the grand jury; is that correct? A. That's correct.

Q. And whose decision was it that they not be presented to the grand jury? A. Mr. Snyder and/or Mr. Blondin.

Q. All right, sir.

* * * * * *

DIRECT EXAMINATION
BY MR. WALLER

(171) *** Q. During March of 1982, did you have—or strike that. During March of 1982, were you contacted by any representatives of the Internal Revenue Service regarding these investments? **[William J. Herman, Jr.]** A. Yes.

Q. Do you recall when in March of 1982 you were first contacted? A. In the early part of the month. I don't have the exact date.

(172) Q. Do you recall who contacted you? A. It was a person that represented himself as an I.R.S. agent, and I believe the last name is Burke.

Q. What were the circumstances of that initial contact? A. I received a phone call in my office where I practice medicine to the extent that there were investigators in the Houston area questioning investors in the partnership offered by United Financial Operations and if I would be interested in answering a questionnaire or actually being interviewed as such and having a questionnaire filled out. That was the original proposal.

Q. Did the agent indicate to you whether or not there was a grand jury investigation going on at that time? A. Yes, there was—that was the knowledge of mine and in the conversation I surely asked about this. This was a well-known fact, and I certainly indicated or certainly I was of the belief that this was in conjunction with that investigation.

Q. Did he indicate to you whether or not your opportunity to interview with him was a voluntary interview? A. Yes, he indicated that it was a voluntary interview. However, I had indication that had I not cooperated I might have two consequences, one being subpoenaed by the grand jury and the second being a personal type of investigation.

* * * * * *

(175) *** Q. Did any of the questions go to the deductibility of the investment by you on your individual return? A. Yes, absolutely. In fact, the overall tone and nature of the questionnaire, in my opinion, at that time—and it continues to be my opinion—was primarily directed towards the tax implications of the investments on my part, as far as—well, also on the conduct of the presentation of the material on the part of the representatives of UFO and the general partners.

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DIRECT EXAMINATION
BY MR. WALLER

(241) *** Q. Is it fair to say that you or Mr. Mendrop would decide who needed to have access to grand jury material initially and at that point and after that point in time you would notify Mr. Snyder or Mr. Blondin? **[IRS Agent Paul Raybin]** A. I don't think you can say that as a generalization, no.

Q. That happened in some cases? A. There were occasions when, such as with I.R.S. management, Mr. Mendrop and I were

informed by our manager of people who needed to be included in the 6(e) for the purposes of supervisory controls and we would then have discussion with Mr. Snyder or Blondin regarding that a request had been made to us by our management.

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DIRECT EXAMINATION
BY MR. TREECE

(243) *** Q. Mr. Raybin, was it your custom when you went out to conduct an investigation while the grand jury was ongoing to represent yourself as an agent of the grand jury? **[IRS Agent Paul Raybin]** A. No.

Q. Did you ever do that? A. I don't believe I ever used the term "agent of the grand jury" when contacting a witness.

Q. How about in your interviews of various persons? A. Again, I don't believe I ever used that term.

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CROSS EXAMINATION
BY MR. ALEXANDER

(260) *** Q. You testified about tax auditors computing a tax in connection with investors. Was there any civil purpose whatsoever in connection with the making of those computations, (261) sir? **[IRS Agent Paul Raybin]** A. No.

Q. Was any of that material ever turned over to anybody that had a civil function at the Internal Revenue Service that was— A. No.

Q. With regard to the indexers, the people that were working on the indexing for use with the computers, do you recall that, sir? A. Yes.

Q. Were those indexers given any instructions with regard to Rule 6(e) secrecy? A. Yes.

Q. Who gave those instructions, do you recall? A. I would have.

Q. What did you tell them? A. During a meeting, the initial meeting when we got the group of people together that were going to be doing the indexing, I instructed them that it was a grand jury investigation and that as a result of that any information that they were exposed to during their indexing or the responsibilities that they had with regard to this investigation had to be maintained secretly like any other grand jury information that was obtained, if they had any experience in that area. If they had no experience, for those that had no such experience, I went on to explain that the information was required to be maintained in (262) the office where they are going to be doing the work and that they could not disclose any of the information to any other outside source.

Q. Now, with regard to material that you collected or gathered during the grand jury investigation, whether gathered by means of a subpoena or by means of a voluntary turnover by a witness, did you ever turn over any such material to the Internal Revenue Service for use in civil connections? A. No.

Q. Now, with regard to witnesses who were interviewed outside of the presence of the grand jury, whether it be investors or other witnesses—are you with me so far?—who would conduct those interviews for the most part, sir? A. Primarily, it was either Mr. Snyder or Mr. Blondin.

Q. And would you be present and assist at the interviewing of those witnesses? A. Quite often, yeah.

Q. And was any record made out of the grand jury interviews of these witnesses? A. Often there was a taped transcript or a tape recording of that interview that was later transcribed.

Q. All right. Now, did you at any time ever show a witness a grand jury transcript of someone else's testimony? A. No.

Q. And if you recall, sir, did you ever tell a witness what (263) another witness had said before the grand jury? A. No.

Q. Now, you also interviewed investors, am I right, sir? A. To a limited degree, yes.

Q. And were there some other witnesses that you may have interviewed outside the presence of Mr. Blondin or Mr. Snyder? A. Yes.

Q. Now, when you interviewed these witnesses, how did you introduce yourself, sir? A. I showed them my credentials and explained to them I was a special agent with the Criminal Investigation Division, or just with the I.R.S., assisting the Department of Justice in a grand jury investigation.

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(266) *** Q. Now, did you at any time describe yourself to a witness as an agent of the grand jury, sir? A. I don't recall ever using that term with a witness.

Q. Was that a term of your choosing or did someone else use that term when talking to you? A. I guess the first time I heard that term was from (267) discussions with attorneys in the U.S. Attorney's Office and Department of Justice. It's not my term.

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RE -DIRECT EXAMINATION
BY MR. NESLAND

(279) *** Q. Is it fair to say then he'll be able to identify each of the people on the 6(e) order and tell us what their function was and why they were put on there? **[IRS Agent Paul Raybin]** A. I don't know what his recollection as to those people are. We would have reviewed the individuals or group of individuals with Mr. Snyder. He would have given us the okay. I do not know whether he would specifically know the names of the individuals.

Q. He might recall a dozen or so that you couldn't recall as to whether they were on there? A. As I remember, we were going

over that on Thursday, one of the group that I didn't specifically recall.

Q. Could you answer my question, Mr. Raybin? A. What—

MR. ALEXANDER: The question calls for speculation, Your Honor, in the first place.

THE COURT: It does, sustained.

Q. (BY MR. NESLAND) All right. He made the decision who to put on the list. Isn't it fair to say that you made the decision to make the disclosure to Mr. Arbogget? A. Yes.

Q. All right, and you made the decision to make the disclosure to Mr. Romero? (280) A. Yes.

Q. And I believe you testified you talked to another agent. What was his name? A. Kathleen Budd.

Q. All right, and I assume you made the decision to make the disclosure to Kathleen Budd? A. Yes, I did.

Q. So that he made the decision after you'd made the disclosure that you ought to put them on the list? A. No, in the general sense, Mr. Snyder made—in almost all cases Mr. Snyder made the decision prior to disclosure being made. In those three instances, he did not.

Q. You made that decision? A. I just testified that I did.

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RE -DIRECT EXAMINATION
BY MR. TREECE

(323) *** Q. You gave an affidavit in Civil Action 92-5M-1545 on or about December 10, 1982; is that correct? **[IRS Agent Paul Raybin]** A. Yes, on that date regarding that lawsuit, at that time.

MR. TREECE: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (BY MR. TREECE) At that time you represented to this court, this United States District Court, did you not, that you were sworn in as an agent of Federal Grand Jury 80-2, Judicial District of Colorado, and that as an agent of that grand jury, your job was to provide investigative assistance; is that correct? A. I did sign that document, yes.

(324) Q. And you testified—or you signed this document, this affidavit, that you acted as an agent for that grand jury through June '81 when it expired; is that correct? A. Yes.

Q. Okay, and then further in his affidavit, you represented to this Court that you acted as an agent of Grand Jury 81-2 from July 8, '81, until that grand jury returned an indictment; is that correct? A. That affidavit does state that, yes.

Q. So you have—did you testify earlier today that you had never represented yourself to be an agent to the grand jury to anybody? Was that your testimony? A. I believe my testimony was I never represented myself as an agent to any witness that I talked to during the course of the investigation.

Q. So you have represented yourself as an agent of the grand jury is that correct? You agree with that? A. That representation is made in that statement and that's the result of semantics as opposed to in actuality, I guess.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(364) *** Q. Now, at any time during this investigation, sir, did you have any contact or take any directions from people on the civil side of I.R.S. who were involved in civil aspects of this case? **[IRS Agent Richard Mendrop]** A. No, sir.

Q. All right. Now, sir, with regard to your duties, did you testify before the grand jury as a part of your investigative duties? A. Yes, sir.

Q. And would you tell us generally, sir, again, in connection now with your duties in connection with this grand jury investigation, how would you describe your duties? A. Primarily, to assist the government attorneys in whatever needs they had as far as scheduling of documents, getting documents in order, reviewing documents, assisting them in the (365) conduct of interviews outside the grand jury.

Q. All right, sir, Now, in connection with your appearances before the grand jury, were you sworn before you testified before the grand jury, sir? A. Yes, sir.

Q. And who administered the oath to you? A. I believe it was either the foreman or assistant foreman of the grand jury.

Q. Was that true of both the first grand jury and the second grand jury? A. Yes sir.

Q. As a matter of fact, actually, even though you had been sworn, were you subsequently sworn on various occasions when you appeared before the grand jury? A. I believe on almost every occasion that I appeared, I was sworn.

Q. You took the oath again? A. Yes, sir.

Q. Do you happen to know why you were administered an oath after once you had been put under oath, sir, a subsequent oath, if you know? A. I'm not sure I understand your question.

Q. All right. Did anyone explain to you why you were given a second and third and fourth oath after you had— A. Oh, on each subsequent appearance before the grand jury?

(366) Q. Yes, sir. A. I didn't know for sure. I thought it was the general practice.

Q. All right, sir. Now, when you first went before the grand jury after you were sworn in, Mr. Snyder also purported to give you an oath, did he not? A. Yes, sir.

Q. Now, the oath given or the purported oath given by Mr. Snyder, was that before you were sworn in by the foreman or deputy foreman or after you were sworn? A. That was after.

Q. Was that true of the second grand jury also, that you only received a purported oath from Mr. Snyder after you had been sworn in by the foreman or deputy foreman? A. Yes, sir.

Q. Now, the phrase "agent of the grand jury," sir, was that a phrase that you had used prior to this investigation? A. I was not familiar with the phrase prior to this investigation.

Q. And how did you become familiar with it in this particular investigation? A. I believe the first time I heard it was from Mr. Snyder.

Q. And have you ever referred to yourself, when talking to a witness, as an agent of the grand jury? A. No, sir.

(367) Q. And when you conducted any kind of an interview or even just picked up documents, did you ever announce that you were an agent of the grand jury? A. No, sir, I don't believe I used that wording.

Q. Did you have a standard, more or less, procedure that you followed in introducing yourself to a witness? A. Yes, sir.

Q. And would you tell us how you would introduce yourself, sir? A. I would usually show them my credentials and inform them that I was a special agent of the I.R.S., that I was assisting in a federal grand jury investigation, assisting the U.S. Attorney's Office and other government attorneys.

Q. All right, sir. Now, in this purported oath that Mr. Snyder gave you, that oath was to the effect that you were to keep secret all grand jury material and not make any improper disclosures; isn't that correct? A. Yes, sir.

Q. And did you, during the course of this investigation, make any improper disclosures, sir, to your knowledge? A. No, sir.

Q. Now, did the foreman of the grand jury at any time instruct you in your duties? A. No, sir.

Q. Would I be correct if I were to say that all of your own instructions came from either Mr. Blondin or Mr. Snyder? (368) A. Yes, sir.

Q. Now, there came a time when Mr. Scharf joined the government team; is that correct? A. Yes, sir.

Q. Was that subsequent to the indictment? A. Approximately around that time, yes, sir. I believe it was—he had participated in a review procedure, I believe, sometime before the indictment. As to when he became fully involved with the matter, I'm not certain, but he did get involved quite extensively at or about the time of the indictment or shortly thereafter.

Q. Now, did Mr. Scharf ever appear before the grand jury? A. No, sir, I don't believe so.

Q. Now, if we could, sir, I would like to direct your attention to the procedures, the security procedures, that were used to maintain and store grand jury material. Going back to when the investigation began, did you have a room at the outset where grand jury materials were kept? A. Yes, we did.

Q. Where was that room, sir? A. That was in the Federal Building here in the U.S. Attorney's Office.

Q. And that would be what, in January of '81, approximately? A. Yes, sir.

Q. And how long did you maintain—strike that. The United (369) States Attorney's Office on the 12th floor? A. Yes, sir.

Q. Now, is there a lock on the door such that you can't enter the United States Attorney's Office section without either knowing a code or having someone authorize you to enter? A. That's right, a combination is necessary or recognition by the receptionist.

Q. Now, what kind of a room was the grand jury materials stored in in the United States Attorney's Office? A. It was a relatively small locked room.

Q. Were there keys to the room? A. There were keys.

Q. Did you have a key? A. Yes, sir, I did.

Q. Did Mr. Raybin have a key? A. Yes, sir.

Q. Now, what kind of records were kept in there, generally speaking? A. These were principally the records that were collected from the summonses or subpoenas that were issued by the grand jury and any other records that we had collected during the course of the investigation with the exception of income tax returns and certain records which had been collected prior to the initiation of the grand jury.

Q. Were transcripts kept in that room, sir? (370) A. Yes, sir.

Q. All right. Now, were there any procedures adopted as to who could enter the room and who could not enter the rooms? A. There were procedures governing admittance, yes, sir.

Q. Would you tell us what those procedures were? A. The only people permitted in the room were those who were listed on the 6(e) list. As a practical matter, only Special Agent Raybin and myself were in the room for the most part, and when the attorneys from Washington were up, they would join us in that room. The only other people that were permitted in the room were only there when we were there to supervise them. I don't recall that people were ever permitted in there unless one of us was present. By "us," I mean either one of the attorneys or Special Agent Raybin or myself.

Q. Now, during the time that the grand jury material was stored in this room in the United States Attorney's Office, were witness interviews conducted in that room or in another room? A. Well, there were a few occasions when I believe some wit-

nesses were brought into that room, but for the most part all interviews occurring outside the grand jury were conducted in other rooms in the U.S. Attorney's Office or elsewhere.

Q. Now, was the door to this particular room left locked or unlocked when you were not working in the room? A. We locked it.

(371) Q. And did you at any time authorize anybody that was not on the Rule 6(e) list to go in that room and remain in there alone? A. No, sir.

Q. To your knowledge, did anybody else on the government team? A. Not to my knowledge.

Q. Now, there came a time when you moved from that room; is that correct? A. Yes, sir, that was in November of 1981.

Q. And where did you move to, sir? A. We moved to the courthouse, third floor.

Q. And what kind of a room was that, sir? Excuse me, that's this very courthouse we're in? A. Yes, sir.

Q. What kind of a room was that? A. This was a little bit larger office space. It was actually two rooms connected by a door. The doors—special locks had been installed on those doors so that the keys were controlled by the people on the 6(e) list, including Agent Raybin and myself, and the same rules were in effect as far as admission to the room as were in effect with the previous room.

Q. Well, now, do you happen to know whether or not new locks were installed in those doors when you designated those rooms for storage of grand jury material? A. To my knowledge there were new locks installed.

Q. And you had a key and Mr. Raybin had a key? (372) A. Yes, sir.

Q. And the United States Attorney's Office had a key? A. Yes, sir. Well, excuse me, when you said the U.S. Attorney's

Office had a key, I don't believe at that point that they did have a key. I think that the keys were provided to us by the clerk of the court, Mr. Manspeaker, and he provided keys to Agent Raybin and myself and we made keys available upon request to attorneys Snyder and Blondin whenever they needed access.

Q. Did Mr. Snyder or Mr. Blondin direct you to keep the keys to those rooms then? A. Yes, sir.

Q. And again, was anyone not on the 6(e) list allowed entry into that room? A. Not to my knowledge.

Q. Now, again, did there come a time when you moved out of the courthouse? A. Yes, sir, we moved out of the courthouse in May of 1982.

Q. And where did you go at that point? A. Across the street to the U.S. Post Office, on the fourth floor.

Q. Excuse me, going back a moment to when you were at this second space on the third floor— A. Yes, sir.

Q.—how did you move the material from the U.S. Attorney's (373) Office to the courthouse? A. Well, Agent Raybin and I, we were able to secure some assistance from people provided to us by the I.R.S. We boxed up all the materials and we supervised the move. We actually accompanied the materials as they were moved from one location to the other.

Q. So the materials were not out of your presence then? A. Right. We would make sure that the materials were loaded onto a truck or whatever vehicle we had. During the actual ride over in the truck, I can't say that we were actually in attendance with that truck, but one of us was on the other end to receive the material when it arrived.

Q. I see, and were there any labels on the boxes or anything? A.The labels on the boxes would include the stickers put there by the grand jury and any of the writing that happened to be on the

boxes at the time we received them, at the time the grand jury received them.

Q. Would you go down into the basement or how did you—you just took a regular route right over to the third floor? A. Oh, yes, sir.

Q. Then in May of 1982— A. In fact—you say "regular route." As I think about it, we actually took the material in the freight elevator, went all the way down into the basement and crossed over and came back up, so actually we didn't use the public hallways to transport (374) it.

Q. As a matter of fact, you did that for security reasons, didn't you? A. Yes, sir.

Q. To preserve the security of the grand jury material; isn't that correct? A. That's correct.

Q. Then did you—you said May of '82 you moved again? A. We did.

Q. And went to the Post Office Building? A. Yes, sir.

Q. What floor were you on there? A. The fourth floor.

Q. Now, were any special arrangements made before you moved to the post office and put the grand jury material on the fourth floor? A. Again, new locks were installed because that building was under control of GSA, so they put locks in that only we—by that I mean Special Agent Raybin and myself and the attorneys—has access to those keys. Even the GSA was not given keys to those offices.

Q. Did Mr. Snyder and Mr. Blondin tell you to maintain custody of those keys? A. Yes, sir, they did.

Q. Pardon? (375) A. Yes, sir.

Q. Did anybody from GSA have a key, do you know? A. Not to my knowledge.

Q. Or did the cleaning staff have a key? A. The only cleaning that occured was during the times that we were occupying the offices.

Q. All right, and did you follow the same security procedures, namely that no one on the 6(e) list was allowed in the room? A. That's correct.

Q. And that you had to be accompanied by authorized personnel if you were to enter that room and you weren't on the 6(e) list; isn't that correct? A. Yes, sir

Q. Did there come a time then in October of '82 when you once again moved all this material? A. Yes, sir, we did that.

Q. And where did you move on this occasion, sir? A. To the Customs House here in downtown Denver.

Q. Now, again, before moving to the Customs House, were any special arrangements or special procedures followed to ready the rooms for the grand jury material? A. Again, this time we had the deadbolts added to the existing locks and those keys were kept under the same controls as we had before. In addition, the doors on the rooms that we were given at the Customs House had a ventilation area in the lower (376) part of the doors so bars were installed to prevent access through that ventilation area.

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CROSS EXAMINATION
BY MR. NESLAND

(396) *** Q. You testified that the grand jury materials were originally kept on the 12th floor of the U.S. Attorney's Office in the Federal Building; is that correct? **[IRS Agent Richard Mendrop]** A. Yes, sir.

Q. And then as I understand it, in November of '81, you moved them to the third floor of the courthouse? A. Yes, sir.

Q. All right. Did you move everything from the 12th floor over to the third floor or did you leave some over in the U.S. Attorney's Office and bring some over here? A. Initially, we left a few things. There were a few records (397) left behind. Now, whether —I don't believe—I don't know whether those were grand jury records. We may have kept some copies of few transcripts that we were finding that we needed more frequently. I can't recall if we actually did or did not. The reason I say that, there was a file cabinet left behind with some correspondence, memoranda, that we kept, I believe, in the U.S. Attorney's Office for a while before it was moved.

Q. Ultimately, it was moved over but you don't know when, that file cabinet? A. Yes, sir.

Q. But for a period of time, it remained behind on the 12th floor? A. I believe so.

Q. Who had the keys to that office? A. Special Agent Raybin had a key, I had a key. The keys in that instance were handed out by the administrative assistant in the U.S. Attorney's Office, I don't recall her name, so she had whatever other keys there were.

Q. So that other people in the office had keys to that particular office on the 12th floor? A. Well, I'm not certain. When you say other people— in fact, her name I believe was Miriam Corbin. She gave us the keys. Now, whether she had other keys that she gave to other people, I'm not aware of that.

Q. How many witness interviews were conducted in that room on (398) the 12th floor? A. I don't know offhand. There were a number of interviews conducted but I can't say for sure how many.

Q. Was Mr. Birchall ever in that room? A. Yes, he was.

Q. Then in November 1981 when you moved to the third floor, as I understand it, special locks were incorporated into the door leading to the third floor office? A. I believe the locks were

rekeyed because there was only one set of locks. I believe those locks existed before we moved in so we were told that they had rekeyed those locks and we obtained the keys from Mr. Manspeaker.

Q. And you and Agent Raybin kept those keys? A. We each had a key, yes, sir.

Q. And neither Mr. Snyder nor Mr. Blondin had a key? A. That's correct.

Q. Were the documents in this investigation, the grand jury materials in this investigation, the only materials kept in that room or were there other grand jury investigations going on which some of the information was kept in that room? A. No, sir, it wasn't — no information from other grand juries was comingled with the grand jury information on this matter.

Q. All right. Then in May of 1982, you moved all of the information from the third floor over to the U.S. Post Office? (399) A. Yes, sir.

Q. And once again, is it your testimony that you had special keys there? A. Yes, sir.

Q. And you kept one and Mr. Raybin kept one? A. That's correct and there were other keys. Now, I'm aware of at least one other key, one or two other keys. My group manager, Jerry Bandy, had at least one key, and he may have had — in fact, he had one besides that because there were occasions when he gave a key to one of the investigative aides who was assisting us who would have to come over and do some work, but those people are — they were all on the 6(e), the ones that he provided any keys to.

Q. What, did he keep a copy of the 6(e) list so he could see which people were on there? A. I don't believe he kept a copy but he was aware of who was put on the 6(e) list.

Q. So at any point in time he could recall whether any of those people was one of the 78 people on the list? A. When I say

he gave keys, he gave keys to very few people and it was easy for him to recall the names of the few people that he gave keys to.

Q. Any other keys that you can think of that were floating around? A. No, sir. I believe that those were all of the keys.

(400) Q. Were any grand jury documents or grand jury information kept there in connection with other grand jury investigations independent of the Kilpatrick investigation? A. No, that room was used exclusively for this grand jury investigation.

Q. Okay, and then in October of '82 you moved all of that information over to the U.S. Customs House; is that correct? A. Yes, sir.

Q. All right. Is that office shared with anybody? A. No, sir.

Q. So the only documents or grand jury information that's been kept in any one of these offices are those kept in connection with the grand jury investigation of Kilpatrick? A. Yes, sir.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(409) *** Q. Now, overall, sir, how long did this grand jury investigation last? **[Prosecutor Stephen Synder]** A. From January of 1981 till September 30th of 1982.

Q. Now, that would be the second grand jury, wouldn't it? (410) Didn't the first grand jury start in January of '81? A. That's correct.

Q. I'm sorry, I misunderstood, thank you, and when was an indictment returned in the case, sir? A. September 29th or 30th of 1982.

Q. And were there numerous witnesses called before both grand juries? A. Yes, sir.

Q. And did you collect documents and do all the other things that you do in any other investigation? A. Yes, sir.

Q. Do you have an estimate on the approximate number, how many documents you pulled in? A. I could only estimate, approximately 30,000.

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(412) *** Q. All right, sir. Now, with regard to Mr. Raybin — A. Yes, sir.

Q. — who is Mr. Raybin? A. He was a special agent of the Internal Revenue Service here in Denver, Colorado.

Q. And he was assigned to this investigation? A. Yes, sir.

Q. That's also true of Mr. Mendrop? A. Yes, sir.

Q. Now, were they sworn in before they testified or not, sir? A. Yes, sir.

Q. Who swore them in? A. Foreman or the forelady.

Q. Now, you also purported to give an oath to Mr. Raybin and Mr. Mendrop, did you not? A. Yes.

Q. Did you purportedly give them that oath before they were sworn in by the foreman of the grand jury or after they were sworn in by the foreman of the grand jury? A. After.

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(414) *** Q. Now, did you refer to these agents as agents of the grand jury, sir? A. On several occasions, I did, yes, sir.

Q. And where had you — strike that. Had you had any previous experience with the swearing of agents as agents of the grand jury, sir? A. Yes, sir.

Q. Where had you had this experience? A. Atlanta, Georgia.

Q. And what is the practice there, sir? A. In Atlanta, Georgia, the foreman of the grand jury swears an agent in. He has a formal oath that is sworn to him by the foreman of the grand jury when an agent starts assisting and joining in on an investigation before then.

Q. Is the agent sworn then as an agent of the grand jury? A. Yes, sir, that's what they're called.

Q. Have you participated in proceedings where that's been done? A. Yes, sir.

Q. And this was prior to the time that you took on this (415) investigation in Denver; is that correct? A. Yes, sir.

Q. If you happen to know, Mr. Snyder, is that practice still being followed, if you know? A. I don't know if it's being followed in Atlanta. I know it's being followed in the Southern District of Florida.

Q. Florida? A. Yes, sir, it's been.

Q. You have had experience there, also? A. Yes, several months ago.

Q. And the practice there is to swear an agent as an agent of the grand jury? A. Absolutely, sir.

Q. Now, did you on one occasion in this purported oath advise one of the agents that disclosure could be authorized by the foreman of the grand jury? A. Yes, sir.

Q. Was that correct? A. No, sir.

Q. Did you later correct that statement? A. Yes, sir, I did.

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(416) *** Q. Now, to your knowledge, sir, has there been any disclosure of grand jury material in this case to anyone in the Internal Revenue Service for civil purposes? A. There has been none, to my knowledge.

Q. Now, during the course of the investigation, did you have the occasion at any time to advise the grand jury with respect to civil use of the material that they were about to see or that you were obtaining for them? A. It was discussed at several points, yes, sir.

Q. Well, would you tell us, what did you tell the grand jury about that material? A. I told them that the investigation we were conducting was not a civil proceeding whatsoever, that it was not collection of taxes. I informed them on several occasions, I recall, that it would be completely improper to use grand jury subpoenas to collect material to be used in a civil proceeding or in an audit fashion in any manner whatsoever.

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(417) *** Q. Now, did you at any time make any disclosure of grand jury material to anybody on the civil side of I.R.S., sir? A. No, sir.

Q. Did you at any time authorize any agent acting under your direction and control to make a disclosure to the Internal Revenue Service of grand jury material for civil purposes? A. No, sir, quite the contrary. I informed them on several occasions that it absolutely could not be done.

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Q. Now, Mr. Scharf did not participate in the investigation; isn't that correct? A. No, sir, he did not.

Q. So it's just you and Mr. Blondin who directed it? A. That's correct, after Mr. Barksdale left.

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(432) *** Q. Now, the morning of September 9th, before Mr. Birchall appeared before the grand jury, was he in the U.S. Attorney's Office if you know, sir? A. Yes, sir, I think he came up there.

Q. And was he in the room where you stored the grand jury materials? A. Yes, sir, I believe he was.

Q. Was he alone in that room? A. No, sir.

Q. To your knowledge, was Mr. Birchall ever alone in that room? A. No, sir.

Q. Did you ever authorize him to go in that room alone? A. Absolutely not.

Q. Did you follow a routine procedure with respect to who could enter that room and under what circumstances? A. Yes, sir.

Q. What were the procedures that you had all adopted, sir? A. Unless a special agent was there, the last person that left (433) that room closed and locked the door.

Q. Was anyone that was not on the 6(e) disclosure list allowed in that room alone? A. No, sir.

Q. Was that true of all three locations or four locations where you stored grand jury material at various times? A. Yes, sir.

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(466) *** Q. Now, when the grand jury adjourned on the 19th, did you have a discussion with Mr. O'Donnell about a Professor Hjorth? A. Yes, sir, I believe he asked me during the luncheon recess (467) whether his expert could testify the following morning.

Q. And what did you tell him? A. I told him he could.

Q. All right. A. Mr. O'Donnell told me that he wanted his expert to testify before he finished giving his testimony because he didn't want the grand jury to think he was in there blowing smoke or it was unsupported, what he was saying.

Q. So then did you put Professor Hjorth into the grand jury room before Mr. O'Donnell completed his testimony? A. Yes, sir.

Q. That would have been on the what, the morning of the 20th? A. Yes, sir.

Q. In the meantime, Mr. O'Donnell did testify on the afternoon of July 19th, did he not? A. Yes, sir.

Q. And you—did you see him that evening— A. No, sir.

Q. —after the grand jury was over? A. No, sir, not really, not that I recall.

Q. In other words, you went on about your business and he went on about his business? A. Pretty much. There might have been a casual parting.

Q. But other than that, you didn't have any evening meeting with Mr. O'Donnell? (468) A. Oh, absolutely not.

Q. I'm sorry, sir, it wasn't clear, and then the next morning Professor Hjorth appeared before the grand jury? A. Yes, sir.

Q. And he testified for what, about an hour and a half? A. Hour and a half, hour and 15 minutes, something like that.

Q. And then you examined Professor Hjorth, did you not? A. Yes, sir.

Q. Now, again, did Professor Hjorth testify as to factual matters or legal matters? A. Professor Hjorth testified to legal concepts he had.

Q. Did he indicate whether or not he was familiar with the facts himself because of his own investigation or not? A. He said he had almost very little understanding of the facts.

Q. So that his testimony was on the law, is that it? A. Almost exclusively.

Q. Now, during the luncheon recess — strike that. When the luncheon recess came, the grand jury broke up but Professor Hjorth remained in the grand jury room; isn't that right? A. Yes, sir.

Q. And you did, too, didn't you? A. Yes, sir.

Q. And at that time, did you have a discussion with Professor Hjorth? (469) A. Yes, sir.

Q. Now, without going into all the detail, what was the general nature of that discussion? A. In the time that he had been before the grand jury, I really didn't understand everything, what he was saying, so I asked him if he would mind talking to me awhile so he could explain to me because I really didn't understand what he was saying, and he said he would, so we talked like another 30 minutes.

Q. Again, did this concern factual matters or legal concepts? A. Just his legal concepts he had regarding circular financing.

Q. Now, during that conversation, sir, did you ever threaten to prosecute Professor Hjorth? A. No, sir.

Q. Did you, however, tell Professor Hjorth at one point that you would see him in court? A. Yes, I did.

Q. How did that remark come to be made? A. I had asked Professor Hjorth, because his theories were quite involved — my question to him was, could a private citizen in the United States create money; that is, increase the monetary supply of the United States? And he responded to me like two or three times, a person could create basis in property, a private person could, and I finally asked him like the third or fourth time, can a private citizen of the United (470) States increase the monetary supply, and he said, Yes, they could, and I said, I'll see you in court on that one, Professor.

Q. All right. Now, did you at any time impugn Professor Hjorth's intelligence? A. No, sir.

Q. But you certainly differed with his theories, did you not? A. I didn't agree with his theories, no, sir.

Q. Now, did Professor Hjorth also appear briefly before the grand jury on the afternoon of July 20th? A. Yes, sir, he did.

Q. And did you examine him? A. Yes, sir, three or four questions.

Q. And at that time, did Professor Hjorth express to the grand jury his appreciation to you for prodding him in thinking out his theories? A. Yes, sir, he did.

Q. Following Professor Hjorth's testimony on the 20th, did Mr. O'Donnell appear again to conclude his testimony? A. Yes, sir.

Q. And did he then proceed to testify? A. Yes, sir.

Q. Now, following the conclusion of his testimony, did you have a conversation that afternoon with either Mr. O'Donnell or Professor Hjorth? A. Yes, sir.

(471) Q. Was it a long conversation, short or— A. Half an hour.

Q. Where did it take place? A. Grand jury witness room.

Q. And what was the nature of that conversation, sir? A. Mr. O'Donnell had not finished his testimony, what he wanted to say on the record, and the grand jury had to leave because they had to get their cars out of the parking lot before 5:00. If I remember, that's the time they had to get them out by, and so briefly, in the grand jury witness room, he explained to me some other things regarding his defenses. I think he told me the names of one or two lawyers that he had consulted back in 1977 and 1978 regarding the legitimacy of circular finance.

Q. This is Mr. O'Donnell speaking? A. Yes, and several other points, four or five points.

Q. Now, were Special Agent Raybin and Special Agent Mendrop present during that conversation, do you know? A. Special Agent Raybin was, I think. Special Agent Mendrop was in and out.

Q. Now, have you seen or talked to Professor Hjorth since that time? A. No, sir.

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(476) *** Q. All right, sir. Now, Mr. Snyder, you had the occasion during this investigation to issue what we might call letters of assurance, did you not? A. Yes, sir.

Q. Now, could you tell us what was the occasion for your issuing letters of assurance, sir? A. Approximately two months into the investigation, I had subpoenaed some individuals who were represented by Mr. Bernard Bailor, attorney for Caplin & Drysdale. Additionally, he represented virtually every other significant witness in the case, and Mr. Bailor said he wanted to think whether he wanted to allow these people to testify.

Mr. Bailor called me up on the phone and his exact words were, "No tickie, no talkie." That is, before any of his clients would testify, they would have to receive a letter of assurance. Well, some type of immunity I believe is the way he put it. I asked him did he want formal statutory immunity or did he want letters of assurance, and he said letters of assurance were fine, and at that point set up a procedure of how we would issue the letters of assurance, when we would meet it and how we would conduct ourselves in that regard.

Q. Were these assurances always placed in a letter? (477) A. Always.

Q. And did you sign those letters? A. I was the only one who signed them.

Q. Now, did you set your mind on this, did you ever give anyone what might be called oral assurances? A. Absolutely not.

Q. Always done by letter? A. That's the only way it should be done, sir.

Q. Did you at any time seek immunity for anyone? A. No, sir.

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(481) *** Q. (BY MR. ALEXANDER) During the course of the investigation, Mr. Snyder, on several occasions did two

agents read transcripts from the prior grand jury to the second grand jury? A. Yes, sir.

Q. And how did that come about, sir? A. If I remember right, I was having one agent do it and another agent do it and they both had colds and sore throats or something and they asked if they could do it together, to break it up, because they couldn't take it anymore, and I said, yes, go ahead.

Q. And did you advise the grand jury that this would be done—strike that. Did you—what instructions, if any, did you give the grand jury with regard to any questions they might (482) have? A. Of the agent?

Q. Yes, sir. A. I told them under no circumstances should they ask an agent a substantive question when he was reading transcripts.

Q. Were there occasions when you and Mr. Blondin were in the room when transcripts were read? A. That's correct.

Q. And did you explain that to the grand jury? A. Yes, sir.

Q. And what did you say, if anything, about any questions they might have? A. I said they were to ask no substantive questions and I told the agents not to answer any.

Q. Yes, sir. A. And I said if there were questions, just stop it, come get me or Tom, and we'll go back in and handle it.

Q. Did you tell the grand jury that on one or two occasions? A. Yes, sir, and I also told the agents that.

Q. And then were the agents sworn, do you know, before they read the transcripts? A. To my knowledge, they were.

Q. And did the agents answer any questions? A. To my knowledge, they didn't.

Q. You've reviewed the grand jury transcripts, haven't you? (483) A. Yes, sir.

Q. You've reviewed the colloquies, haven't you? A. Yes, sir.

Q. Are there any questions in there answered by the agents? A. No, sir.

Q. Were you present when any of these joint readings went on, if you recall? A. I think I was during one or two.

Q. Was the procedure for one agent to read the question and the other to read the answer? A. Absolutely.

MR. ALEXANDER: I have no further questions, Your Honor.

CROSS EXAMINATION
BY MR. NESLAND

Q. You testified that you reviewed the grand jury transcripts to determine whether or not the agents answered questions before the grand jury. Did you find anywhere in the grand jury remarks of testimony where you gave instructions to the grand jury not to ask questions of the agents? **[Prosecutor Stephen Synder]** A. Yes, sir, I believe I did.

Q. Where? A. I would have to get the colloquies and go through them.

Q. Okay. If you had the opportunity, would you do that? A. I could do it now.

(484) Q. All right, you can do it after we recess. A. That's fine.

Q. All right. You were not present on almost every occasion that transcripts were read to the second grand jury, were you? A. I didn't keep count of it. I was present sometimes, other times I was not.

Q. The agents were in there alone; isn't that correct? A. Yes, sir, at times they were.

Q. In fact, on some occasions they went out of the grand jury and convened the grand jury in your absence and you came down halfway through the time they were reading the transcripts, did you not? A. No, sir.

Q. You've reviewed the grand jury transcripts? A. Yes, sir.

Q. And you never saw an occasion where you came in the middle of the— A. Yes, sir. At times I would come in the middle of it but they wouldn't convene it. Usually I would come in and say, The agent is going to read. They wouldn't convene the grand jury.

Q. Would you tell me how it is that you can have a transcript where only the agents appear and you never appear? Who convened that grand jury session? A. Usually the grand jury would be sitting continuously. You would have a grand jury that started at 1:30, I would handle a (485) witness from like 1:00 to 2:00, walk out, the agent walks in and starts reading.

Q. All right, and you would simply leave? A. Yes, if I had other business.

Q. And you, as I understand it, you gave instructions to the grand jury not to ask any questions of them? A. That's what I understand, yes, sir.

Q. And you didn't ask any questions of them because you weren't there? A. That's correct.

Q. So there is no question they weren't under examination, were they? A. They were not under examination, no, sir, not in the classic sense of the word.

Q. They simply weren't under examination in any sense of the word, were they? A. Sir, they were witnesses. They were not under examination. They were under examination in the sense that they were reading—they had sworn to read that transcript, whatever transcript they were reading, accurately. In that sense maybe you can call it examination, I don't know, but in the other

sense, in terms of what we usually think of examination, which I'm under right now, no, sir.

Q. Did you say they were witnesses because they were under oath and they were put under oath? (486) A. Yes, sir.

Q. Have you reviewed the transcripts and determined that on a number of occasions when they read grand jury transcripts they were not placed under oath? A. Sir, to my knowledge, they were always placed under oath.

Q. If they were not placed under oath, there is no question in your mind that they were not witnesses; isn't that correct? A. Sir, I think they would still be witnesses because they are in the grand jury room performing that function of reading.

Q. They're still a witness? A. Yes, sir.

Q. Even though they're not sworn? A. Sir, they had been sworn so many times—they had been sworn on numerous occasions.

Q. Who are you talking about? A. Special Agent Raybin and Special Agent Mendrop.

Q. When did you place Special Agent Shea under oath? A. I didn't.

Q. You didn't? A. No.

Q. Was there ever an occasion that you placed Special Agent Burke under oath? A. No, sir, I wasn't present.

Q. Were they ever called to the grand jury and placed under oath by the foreman or forelady or deputy foreman or deputy (487) forelady of the grand jury? A. I don't know, sir. I've read the transcript. At the time that happened, I was in London, England. What happened, I do not know.

Q. All right. You've reviewed the transcript and at no time have you determined that either one of those agents were ever placed under oath by the foreman or forelady or deputy foreman

or deputy forelady of the grand jury; isn't that correct? A. Sir, all three told me they were.

Q. I asked you, have you seen that in any transcript? A. Sir, I did not see it in any transcript, no, sir.

Q. What authority were you relying on when you gave the oaths to the agents, Agents Raybin and Mendrop? A. None.

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(492) *** Q. Rule 6(d) also authorizes the witness under examination to be present before the grand jury. Are you familiar with that rule? A. Yes.

Q. Did you determine whether or not more than one witness could appear before the grand jury before you called Agents Raybin and Mendrop to the grand jury to read the transcripts? A. Sir, I was aware generally of the one witness rule but I just really never put it together in that context.

Q. You never—it was your understanding that they were not appearing as witnesses; isn't that correct? A. No, sir, I wouldn't say that.

Q. It's your position that they were appearing as witnesses, you knew that only one witness could appear at a time; is that correct? (493) A. Sir, that's my position, I guess, that I had agents reading transcripts of a previous grand jury. Whether they're witnesses under examination or something, I really never thought about that and I really wasn't concerned about it. I knew about the two witness rule, sir, or I should say the one witness rule, and I never really put the fact that I had two agents reading grand jury transcripts together with that rule.

Q. Because you never considered them witnesses; isn't that correct? A. No, sir, I just never considered it at all.

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(494) *** Q. Did you obtain a 6(e) order to read the transcripts of the first grand jury into the second grand jury? A. Yes, sir, I believe there was.

Q. If one is unavailable, do you have a recollection of having received one? A. I have no specific recollection of having received one, no, sir, but I recall, when the thing came down to be transferred, I talked to Velma or somebody, and she said that it had been done.

Q. Who had obtained it? A. That, I don't know.

Q. You didn't take it upon yourself to seek a court order to disclose the grand jury testimony from the first grand jury to the second grand jury? A. No, sir.

Q. Have you ever seen a copy of any order to that effect? A. No, sir.

Q. Did you obtain a copy or did you obtain a 6(e) order to move or disclose the grand jury information to the people at Lowry Air Force Base for the purposes of the computer program? A. Yes, sir.

Q. Do you know where a copy of that order is? A. Yes, sir, it will be in the miscellaneous files of the (495) clerk of court.

Q. Would that be the same place that the court order is for the transfer of the—for the reading of the grand jury transcripts from the first grand jury to the second grand jury? A. That one should be there, too. The second one, on the Lowry, I'm sure because I was the one that took it personally to have it signed.

Q. Dallas, Texas, did you get one to take information to Dallas, Texas, for the computer program? A. No, sir.

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(496) *** Q. Was a 6(e) order obtained to take the same kind of computer data to Salt Lake City? A. No, sir.

Q. So it was only Lowry? A. That's correct, if I recall.

Q. Who did you apply to to obtain a 6(e) order for Lowry Air Force Base? A. Honorable Fred Winner.

Q. Did you file any kind of paper? A. Yes, sir.

Q. What did you file, an application? A. Yes, sir.

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(500) *** Q. In the oaths that you've testified were given in Atlanta, Georgia or the Southern District of Florida, they also convert the I.R.S. agent into an agent of the grand jury and instruct him that he's no longer working for the Internal Revenue Service but he's now working as an agent of the grand jury and he owes his allegiance to the grand jury, did they say anything (501) like that? A. Not that I know of.

Q. They make him an agent only for the purposes of maintaining secrecy of any information he receives; isn't that correct? A. I think that's the thrust of it, I don't know. I don't know the history and how this thing started or nothing else. I think that is the thrust of it, but like I say, I can't really remember exactly what the oaths says so I don't know if there is any catch or twist, but I would tend to agree with you, sir, just based upon my memory, that that's probably the reason why.

Q. It's similar, as I understand it, to the kind of oath you gave these agents before this grand jury? A. Once again, you know, I was trying to paraphrase it.

Q. I mean, you were just kind of shooting from the hip on that oath? A. Yes, sir.

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(502) *** Q. You testified quite a bit about your conversation with Professor Hjorth during the luncheon intermission which you testified, I believe, lasted about 30 minutes? A. Yes, sir.

Q. Did you ever inform him that he was a discredit to his profession? A. No, sir.

Q. Did you ever tell him that he was a disgrace to his profession? A. No, sir, not words to that effect.

Q. Did you ever make any kind of comment like that? A. No, sir.

Q. So as Mr. Alexander would ask, if Professor Hjorth said that you made a comment like that, I assume you would call him a liar. A. I don't know if I would call him a liar. I would tell him he was mistaken.

Q. You distinguish that from Mr. Birchall, he's a liar? (503) A. Yes, sir, I do.

Q. And Professor Hjorth is mistaken? A. Yes, I do.

Q. Mr. Hjorth remained in the room after the luncheon break at your request, did he not? A. Yes.

Q. I believe your testimony was that you wanted to ask him some more questions about certain things he testified so you asked him to remain behind? A. I asked him if he wouldn't mind talking to me.

Q. All right, and he obliged you? A. He said, Sure.

Q. Did you make any efforts to determine whether or not any grand jurors remained in that room? A. At that time, when you say make any efforts, I was aware during our conversations there were grand jurors present, yes, sir.

Q. And you continued a conversation in any event? A. Yes, sir.

Q. Would you describe the conversation as casual? A. No, sir.

Q. Would you describe it as heated? A. At some points, yes, sir.

Q. Did you make any efforts to try to intimidate Professor Hjorth? (504) A. No, not really.

Q. If he felt intimidated by your conversation, would you be surprised by that? A. Given what he was saying, no, sir.

Q. Pardon? A. Given the theories he was expressing, no, sir, I wouldn't be surprised if he felt intimidated.

Q. So you had a heated exchange about his professional opinion that he was testifying to before the grand jury, is that what the conversation involved? A. No, sir, I was more trying to figure out what he was saying. I didn't understand at all what he was saying because he kept talking about switching from cash to accrual method and kept talking about how there was value here but that would change it from a cash basis transaction to an accrual basis transaction. He was talking about a lot of tough stuff that I didn't understand and I was trying to understand, to be real honest, because there were couple points he totally lost me.

Q. Did you express disbelief in his opinions to him? A. On some of them, yes, sir.

Q. I believe you testified that you apologized to the grand jury or did you testify you apologized to the grand jury about the discussion you had with him after the luncheon break? A. No, sir.

Q. I may be transposing that from your summary. (505) A. No, sir, I don't believe it's in my summary either, because it didn't happen.

Q. All right. Who were present during the conversation other than you and Professor Hjorth? A. Mr. Declan O'Donnell was there, Mr. Paul Raybin was there, Mr. Roger Schneider was there for part of it, the foreman of the grand jury was in and out, and then there was a grand juror who sat like two or three rows up who always knitted and she was there for part of it.

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(515) *** Q. So you made the decision to issue each of the 23 or so letters of assurance? A. Yes, sir.

Q. Based on your own judgment? A. Yes, sir.

Q. And then there came a time that you stopped issuing those letters; isn't that a fact? A. Yes, sir.

Q. And it was at that time that you reached the judgment that all good things must come to an end? A. Yes, sir.

Q. And you called witnesses in thereafter to invoke their Fifth Amendment; isn't that right? A. Yes, sir.

Q. And you knew when those witnesses were called that they were going to invoke their Fifth Amendment? A. Yes, sir.

Q. That was not a condition for your seeking statutory immunity, was it? A. No, sir.

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(523) *** Q. All right. I just wanted to clarify one thing. You testified to obtaining a 6(e) order to produce information input sheets and deliver them to Lowry Air Force Base? A. Yes, sir.

Q. Do you have any knowledge as to whether or not that same kind of input sheet or document or documents utilizing grand jury materials were sent to Salt Lake City? A. I have no knowledge of that, sir.

Q. Do you know that there was a computer program utilized in Salt Lake City— A. No, sir.

Q. —in this investigation? A. (The witness shook his head.)

Q. Did you know one was used in Dallas, Texas? A. No, sir.

Q. So that would have been done without your knowledge, at least? A. Yes, sir, I wasn't aware of those facts.

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CROSS EXAMINATION
BY MR. TREECE

(541) *** Q. (BY MR. TREECE) You have suggested that perhaps you were not quarreling with the main portions of his opinions that day; is that your statement? **[Prosecutor Stephen Synder]** A. Sir, there were some things that he was saying. I was only trying to understand what he was saying.

Q. I understand that, sir. A. There were other things that he was saying that I disagreed with.

Q. Right, and you disagreed sufficiently with the totality of his opinions that you did not take them as having sufficient merit to justify your reconsidering this indictment; isn't that true? A. Oh, no, sir, we reconsidered whether there should be indictment in light of what his testimony was. That was reconsidered.

Q. Well, you reconsidered it while you were talking to him? A. No, sir.

Q. But you told him you were going to see him in court, which (542) indicated you were telling him you didn't intend to reconsider. A. Sir, the expression I used, "I'll see you in court on that one," is a rather flippant expression meaning whatever—what it means is, I don't think you can support that position anyway, anywhere. I was not at that point indicating that there was going to be an indictment or anything else. I was not trying to insinuate that.

Q. And did you believe that the juror or jurors that were listening to your debate with the witness understood that you were being flippant at that time? A. Oh, I think so.

Q. And they would understand that by the tone of your voice or what? A. No, sir, I think just the whole circumstances. I don't think it was just exactly any big deal that was going on.

Q. Now, you also indicated that Profesor Hjorth might have felt intimidated? A. No, sir.

Q. You did not testify to that? A. He might have felt intimidated, I don't know.

Q. Didn't you say that you thought he might well have felt intimidated? A. Sir, I don't know what Professor Hjorth was thinking or feeling.

Q. Okay. Well, is there something that you said that you (543) believe may have made him think that? A. There was nothing I said that would have given him that—

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RE-DIRECT EXAMINATION
BY MR. ALEXANDER

(597) *** Q. Mr. Snyder, would you tell us again, if you have not already, with regard to the letters to the witnesses. I believe Defendants' Exhibits V-1 and so forth, which state or rather name the targets in those letters, what was the purpose in naming the targets, sir? **[Prosecutor Stephen Synder]** A. Sir, the purpose in naming the targets was to inform the person exactly what the nature and scope of the investigation (598) is so a person could know if they could respond to us. I did not think it was proper just to write a personal letter that says, There is a grand jury investigation, would you please appear.

Q. Were these letters letters to witnesses who were available under service of process, do you recall? A. No, sir, every letter, the person was not available by process, by American process.

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(599) *** Q. Now, there have been—you were asked some questions that pertained to hearsay before the grand jury. Did you on several occcasions in your colloquy with the grand jury ad-

vise them that you would produce live testimony for them if the grand jury wanted it? A. Yes, sir.

Q. Did you also tell them that witnesses had been interviewed and that transcripts and tapes had been played of those interviews? A. Yes, sir.

Q. Did you advise the grand jury that those tapes and the transcripts were available for their examination? A. Yes, sir.

Q. And on the reading of the transcripts, did you also advise them that if they wanted any of the witnesses brought before them to produce live testimony, that you would, if possible, obtain those witnesses? A. Yes.

Q. Now, did you call before the grand jury some witnesses who you had pretty good indication would take the Fifth Amendment if you called them? A. Yes, sir.

Q. Offhand, do you recall how many witnesses you may have (600) called that you knew were going to take the Fifth? A. Not very many, sir. No more than four or five. Not very many at all.

Q. Now, what was your occasion for calling these witnesses that you knew were going to take the Fifth Amendment? A. With regard to the one situation I'm thinking of, the witnesses were there and available. Negotiations with defense counsel, Mr. Muoio, had been unable to reach an agreement. I wanted a record left behind to show that the government had attempted to obtain information from these people and had been unsuccessful because I thought later that may become a, for want of a better word, point of dispute in further proceedings.

Q. And did their attorney understand that you were going to put them in the grand jury and— A. Yes, sir.

Q. —and have them take their Fifth Amendment on the record? A. Yes, sir.

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(619) *** Q. Now, one of my questions—when I asked you about letters (620) being sent to the witnesses, you indicated that-

they were beyond service of process. Were all of the witnesses who received letters, or potential witnesses, beyond service of process, sir? A. No, sir, I wish to correct my testimony. There were several individuals who we subsequently found out that service of process could be obtained on.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(632) *** Q. And as a special agent, do you investigate potential criminal tax violations? **[IRS Agent Gerard F. Burke]** A. Yes, I do.

Q. Did there come a time when you were assigned some duties in connection with the investigation of Mr. Kilpatrick and others? A. Yes, there was.

Q. And in that connection, sir, did you have the occasion to read transcripts before the grand jury? (633) A. Yes, I did.

Q. And prior to the time—strike that. Who asked you to read those transcripts, do you recall? A. I believe Tom Blondin asked.

Q. Mr. Blondin, all right, sir, and do you recall what dates you read transcripts? A. I believe it was April 6 and 7, 1982.

Q. All right, sir, and now on April 6th, before you read any transcripts, were you administered an oath, sir? A. Before the grand jury, yes.

Q. Who administered that oath? A. The foreman of the Grand Jury.

Q. All right, then did you proceed to read transcripts? A. Yes, I did.

Q. Did the grand jury ask you any questions during the reading of that transcript? A. No, they did not.

Q. On April 6th did you read the transcript or the transcripts on that day along with someone else? A. Read them with Special Agent Rich Mendrop.

Q. Richard Mendrop? A. Right.

Q. Is your name on the 6(e) disclosure list, by the way, sir? A. Yes, it is.

Q. Did you also read transcripts on April 7th? (634) A. Yes, I did.

Q. And did you read them alone on that occasion or how did you read them? A. I read them with Special Agent Jerry Shea.

Q. Is he also with the C.I.D.? A. Yes, he is.

Q. Do you know whether or not his name is on the 6(e) disclosure list? A. I believe it is, yes.

Q. Now, on that occasion, was an oath given at that time before you read the transcripts. A. Yes, it was.

Q. Would you tell us how the oath ws administered, sir, and to who? A. It was administered by the foreman to both Jerry Shea and I at the same time.

Q. So that you both took the oath? A.Yes, we did.

Q. And then you proceeded to read transcripts; is that correct? A. That's correct.

Q. Were there any questions on this occasion by the grand jury? A. No, there was not.

Q. The only thing that you and Mr. Shea did then was read transcripts? (635) A. That's correct.

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CROSS EXAMINATION
BY MR. NESLAND

(636) Q. You made reference to the April 6th transcript where it's your testimony that you and Agent Mendrop read tran-

scripts to the grand jury as opposed to the reported readings by Agent Raybin and Mendrop. That occurred right after the lunch break; isn't that correct? **[IRS Agent Gerard F. Burke]** A. I believe it started in the morning and went into the afternoon. Might have had a break in between.

Q. Let me show you the record. A. Okay.

Q. Is that the first time you appeared before the grand jury? A. Yes, it was.

Q. There was no attorney present when you came in after the lunch break with Agent Mendrop? A. I don't recall whether there was or not.

Q. You don't recall whether Mr. Blondin was there or not? A. I knew he was present, you know, I'm not sure whether he was there specifically or not. I believe he was but I can't recall specifically if he was there.

Q. You were in there for 37 minutes? A. That's correct.

(637) Q. At least according to the transcript, and during that time, you don't know whether Mr. Blondin was there some part or none of the time? A. I can't specifically recall. I was just reading the transcript.

Q. What transcripts did you read? A. I don't remember. I remember one was Dietrich but that was the day, the next day. I don't recall the name of the one we were doing. I think it might have been a female name.

Q. Do you recall Dietrich because you reviewed the grand jury remarks in preparation for your testimony or do you recall it independently? A. No, that's because of reviewing them, yes.

Q. And the transcript of the grand jury reflects that on April 7th, 1982, you and Special Agent Shea came into the grand jury at appproximately 11:21? A. That's correct.

Q. And there was no attorney present there on that occasion, was there? A. I don't know for sure, really, to be honest.

Q. You don't recall one way or the other? A. No.

Q. Had Mr. Shea been into the grand jury prior to that? A. No, he was not.

Q. He introduced himself on that occasion, did he not? (638) A. That's correct.

Q. And on April 7 at 1:29, you and Agent Shea returned to the grand jury; is that correct? A. That's correct.

Q. And you read testimony on that occasion? A. That's correct.

Q. Was there an attorney present in the afternoon? A. I'm not sure. I remember Mr. Blondin came in at one point and, you know, we were concluding, and he said he had another transcript, that we were going to come back after lunch and read that, but to be honest, I really don't know whether he came back in or we were sitting there. I didn't even make any notice.

Q. But you have some recollection that he might have come in after you had read one transcript and said that you'll have another one to read in the afternoon? A. I don't know whether he came in or—I know he was there when we were concluding because we would have gone on. You know, somebody needed to come in and say that we were done, break for lunch and come back. I know Mr. Blondin had done that. I can't recall whether he had opened the door and come in or he was sitting there and said, We're going to break for lunch here.

Q. But you do recall that on each of those occasions you were sworn? (639) A. Definitely, on both of them.

Q. On three? A. No, on the first, April 6th, I was sworn in, and then April 7th I was sworn in. Wasn't everytime we read a transcript that we were sworn in.

Q. You came in on April 6th? A. With Rich Mendrop.

Q. In the afternoon? A. And I was sworn in at that time.

Q. You don't recall what you read, you don't recall whether the attorney was there, but you do recall you were administered an oath? A. Yes, I do.

Q. And you came in twice on April 7th, once at 11:21 and once at 1:29. Were you sworn on both those occasions? A. Weren't sworn in in the afternoon because it was a continuation.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(691) *** Q. (BY MR. ALEXANDER) Direct your attention, sir, to the transcript of grand jury colloquy for April 6, 1982, the 9:08 a. m. transcript, and specifically to page 8 of the transcript. Does the transcript there indicate that there was a reading to the grand jury by Agents Raybin and Mendrop on that day, sir? **[Prosecutor Thomas Blondin]** A. Yes.

Q. And can you tell us whether or not that's correct? A. That's incorrect. Paul Raybin, as I explained to the grand jurors that day, was in London with Jake Snyder interviewing a witness, Jack Walker, so that would have been physically impossible for him to be in front of the grand jury on that day. The person that read before the grand jury that day was Jerry Burke.

Q. Jerry Burke, sir? A. Yes, along with Rich Mendrop, read the transcript of testimony taken the first grand jury in this investigation.

Q. Now, do you recall, sir, was Mr. Burke sworn by the foreman (692) before he read any transcripts? A. Yes, I believe he was sworn before he read the transcripts.

Q. Now, sir, on April 7th, is it correct that Special Agent Burke and Special Agent Shea jointly read transcripts to the grand jury? A. Yes, sir.

Q. Do you recall whether you were present on that day when they read them? A. Yes, sir. In the morning—they read two times, read two different transcripts at two different times.

Q. Were either— A. In the morning it was Mr. Shea and Mr. Burke and I was present during that reading of the transcript.

Q. Do you recall whether or not Mr. Shea and Mr. Burke were sworn in by the foreman before they read the transcripts? A. My best recollection, and I'm pretty sure on this, they were sworn in by the foreman, foreperson, before they read the transcripts.

Q. Now, sir, and I'll show you this if necessary— A. That was on the morning of April 7th, and right after they finished reading, I told the grand jury that we were finished reading this transcript and we were going to do another reading in the afternoon. Now, in the afternoon, I was not present when Mr. Burke and Mr. Shea read their transcript. However, I was present at the beginning when the grand jury was, when (693) there was a quorum, and then I closed the door and seated were the two agents and they were to read the transcript, but I was not present during the reading of that transcript.

Q. Now, have you had the opportunity to examine the transcript of the colloquy of the grand jury for September 29, 1982? A. Yes, I think what you're getting at is some of the mistakes that I pointed out to you in reviewing these transcripts. The September 29th transcript indicates that I was present along with Mr. Synder and Ms. Surbaugh during that grand jury session. I was not present in that grand jury session on September 29th and I didn't arrive in Denver until later on that night and was present on September 30th for the grand jury session when the indictment was presented to the grand jury.

Q. So insofar as if the transcript reflects you as being present on the 29th, that's an error; is that right? A. I believe that's a mistake, sir.

Q. Now, are you familiar with a gentleman by the name of Tom Waters? A. Yes, sir.

Q. Did you have any dealings with Mr. Waters or his attorneys during the course of this investigation? A. Yes, sir. It was shortly before the—right before the contempt hearing for Judge Carrigan in May of 1982. There were two sessions of that, one on April 20th and then on May 6th. Somewhere around that time, prior to that, we—myself, Mr. (694) Scharf and Richard Mendrop—went to the offices of Mr. Waters' attorney to make some arrangements for him to testify at these contempt hearings.

Q. Now, in connection or directing your attention to Mr. Waters, was he called as a witness before the grand jury? A. No, sir.

Q. Was there any particular consideration that you gave effect to in not calling him before the grand jury? A. At this time, I understood—and I'm trying to recollect who in the United States Attorney's Office—I understood that Mr. Waters was subject of an investigation being handled by the United States Attorney's Office, Chuck Torres being the Assistant Unied States Attorney, and because of that, we did not want to interfere in any way with that investigation. I checked to see if Chuck Torres would have any objection to Mr. Snyder and myself questioning Mr. Waters and there was no objection. All we were told was to make sure that the arrangements were made with Mr. Waters' attorney.

Q. And did you do that? A.Yes.

Q. Now, did you, with respect to two witnesses who appeared before the grand jury, ask one of them not to disclose his testimony outside the grand jury room and ask the other not to disclose his testimony or the proceedings except to his attorney? (695) A. Yes, you're referring to my examination of Mr. Hoff and Mr. Major, who were associated with the Thom, Novoni firm up in Seattle, Washington. I believe it was in January, I think it was January 5th or 6th, and in the introduction I told them that this was a secret proceeding, that grand jury information was

secretand they should not disclose grand jury information, and one of them asked me—I don't remember whether it was Mr. Hoff or Mr. Major—whether they could talk to their attorney about it, and I said yes.

Q. Now, you're familiar with Rule 6 of the Federal Rules of Criminal Procedure? A. Yes, sir.

Q. May I ask what caused you to ask these two witnesses to maintain the secrecy of their testimony? A. I was aware at the time of Rule 6. I had read it on a number of occasions prior to that. The specific—the specific language there that there should be no obligations, other obligations of secrecy imposed, I read that before but was just not thinking of it at the time that I was talking to or examining Mr. Hoff and Mr. Major. My recollection of it was that I was—there had been an allegation that had come to our attention through Mr. Kilpatrick's attorney that there was someone that had approached Mr. Kilpatrick and was trying to sell him grand jury information and Mr. Vardaman had advised Mr. Snyder and maybe me that this had been referred to the FBI. (696) I think I was concerned about grand jury leaks or information that may have been disclosed and I think that's the reason that I—

Q. All right. Did you advise any other witnesses to maintain secrecy? A. No, sir.

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CROSS EXAMINATION
BY MR. NESLAND

(697) Q. You testified that you are familiar with the Rule 6(e) provision that no obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)? **[Prosecutor Thomas Blondin]** A. Yes, sir.

Q. Are you familiar with the U.S. Attorney's Manual at all? A. Yes, sir, parts of it.

Q. Is that available to you in the tax department? A. Certainly is.

Q. Have you had occasion to ever refer to the provisions of the United States Attorney's Manual insofar as they relate to grand jury secrecy? A. Yes, sir, I've read—I believe you're referring to Title IX.

Q. Yes, Title IX? A. Yes, I've reviewed the United States Attorney's Manual on many occasions.

Q. Are you familiar with that provision, which is 9-11.360 (698) which states that a grand jury witness cannot be obliged to keep the proceedings secret? A. Yes, I have read that portion. I don't know if that's the specific section. I know what you're referring to and I have read the United States Attorney's Manual and am familiar that that basically repeats what Rule 6(e) is.

Q. Well, it makes it even clearer, doesn't it? It simply says you can't impose secrecy obligations upon witnesses of the grand jury, which is clearer even than Rule 6, isn't it? A. Yes, it is.

Q. And are you familiar with the fact that the section immediately following 360—that is, 9-11.361—again reiterates that witnesses before a grand jury cannot be placed under secrecy obligations? A. I 'm familiar with the United States Attorney's Manual's discussion that witnesses before the grand jury should not be placed under obligations of secrecy. Now, as to that particular section that you're referring to, I don't—I don't have a specific recollection.

Q. So you wouldn't be familiar with the provision following 361, which is 9-11.362, which again repeats that no secrecy obligation can be imposed on a witness before a grand jury? A. I don't remember that specific section but if you would show me the manual, I would be able to. Maybe it would refresh my recollection and I could tell you something about it.

(699) Q. And I believe you testified that the reason that you imposed the secrecy obligations on the former attorneys for

Mr. Kilpatrick in the SEC proceedings was because you were concerned about leaks? A. I believe what I stated was that one of my concerns at the time—and I think this is what was going through my mind and my state of mind—was the allegation had been made concerning the selling of grand jury information, or the attempt, to Mr. Kilpatrick, and I believe that is what was the catalyst, if you would, for my statement to Mr. Hoff and Mr. Major, yes.

Q. All right, and I believe you testified that this was in January of 1982? A. Yes, sir.

Q. Do you recall on January 5, 1982, just prior to calling David Hoff to the grand jury, that you called Christopher Wells, SEC enforcement attorney? A. Yes, sir.

Q. And I assume you've reviewed these transcripts in the past and in preparation for this hearing, have you not? A. I have reviewed some of the transcripts. I have not reviewed Mr. Wells' transcripts so—I do remember calling him that same day before Mr. Hoff and Mr. Major.

Q. You didn't impose any secrecy obligation on Christopher Wells, did you? A. No, sir. As you know, he was an attorney for the (700) government and I didn't feel it was necessary to impose that or to tell him about it. It was a mistake to impose an obligation of secrecy on the witnesses, Hoff and Major.

Q. Have you ever done that before? A. I can't say that I have never done it before but I certainly don't remember ever doing it before in other grand juries or certainly not in the Kilpatrick grand jury.

Q. Well, why don't you give me an estimate of the number of people that you've examined before grand juries in your experience. Can you give me an estimate of those? A. Boy, it would be difficult. I would say probably over—probably over 50.

Q. And out of that— A. Maybe more.

Q. And out of that number, the only times you can recall placing any of them under secrecy obligations would have been these two attorneys who had formerly represented Mr. Kilpatrick in the SEC proceedings, is that a fair statement? A. Let me put it this way—

Q. Well, wuld you mind— A. —I had mentioned the secrecy provisions of Rule 6 to other witnesses and I do not believe I've ever imposed any obligation as to secrecy. I believe it was in the context of assuring them that the information that they provided to the grand jury would be kept in secret when they were concerned (701) about testifying, and this is probably in some of the drug cases or investigations that I have had in Florida, and if you look at the transcripts of those examinations, I may have used some loose language on it and been imprecise, but I don't recollect ever imposing obligations of secrecy on any other witness.

Q. But you do concede that— A. Oh yes.

Q. That occurred here and you told them not to disclose the grand jury testimony outside of the grand jury room? A. That's right.

Q. And it's your testimony that these are the only two out of the 50 or so that you've done that you went that far? A. Yes, sir, I believe that would be a fair statement.

Q. Do you recall that after David Hoff's testimony, that you examined Roger Cossack, C-o-s-s-a-c-k, on the same day? A. I remember coming before the grand jury and examining Hoff and Major and I remember there was—they didn't follow each other but there was some—I don't know if Hoff was first or Major was first but after one of them testified, Mr. Cossack testified.

Q. And you didn't impose any secrecy obligation on him? A. No. If I remember correctly, Mr. Cossack's purpose of being before the grand jury was merely to turn over records to the grand jury on behalf of his client, Mr. Gatliff, Howard (702) Gatliff. I don't think he offered any subsequent testimony.

Q. You did call John Pettingill the same day, did you not? A. I could have. I don't have a specific recollection of John Pettingill but do I remember John Pettingill being present to produce records that he had been subpoenaed for, yes, and if this is the same day, he was represented by Plato Cacheris. It may have been the same day, I'm not sure.

Q. And you didn't impose any secrecy obligation on him on that occasion? A. No, sir.

Q. Do you recall that you also called George L. Harman, H-a-r-m-a-n, on January 5, 1982? A. Yes, I remember. He was in the afternoon, I believe.

Q. Correct. You didn't impose any secrecy obligation on Mr. Harman on that occasion, did you? A. No, sir.

Q. Do you recall that you also called Patty Akkola, A-k-k-o-l-a, on that same day in the afternoon? A. I could have. I don't remember her being called that day, but—

Q. If the transcript reflects that you did— A. If the transcript reflects it, I probably did, yes, that day.

Q. And you didn't impose any secrecy obligations on her on January 5, 1982? (703) A. No, not that I can remember.

Q. And then you appeared again on January 7th with witnesses, did you not, which is only two days later than the appearance of Hoff and Major? A. Yes, sir.

Q. And you didn't impose any secrecy obligations on the witnesses you called on that occasion? A. No, sir, no, I don't believe I did.

Q. Was your concern that Hoff and Major were trying to sell grand jury information to Mr. Kilpatrick? Is that what you were concerned about? A. No, I would not impugn the integrity of defense counsel Hoff and Major. I found them to be very—I found them to be very honest and trustworthy and straightforward. It was not a deliberate intent to keep information from

being sold. What I said was it was my state of mind at that time, I believe, that I was concerned about this attempt to bribe a target or to extort a target with grand jury information and was not thinking of Rule 6. I think that was my concern with Mr. Hoff and Mr. Major. Yes, it was in my mind, but I wasn't concerned with them actually going and trying to sell information to any of the defendants.

Q. But you were not concerned that any of these other witnesses would create that same risk; it was simply the two attorneys? (704) A. It's hard to get back to my state of mind at that time, but if you look at it, I don't think Mr. Pettingill—if he appeared that day, it was there just to present records. Mr. Cossack was there just to present records. I did not impose any secrecy requirements or obligations on them and I was not apparently laboring under the same concerns. I did not make the same mistake with those witnesses.

Q. It kind of came and went in the same day, this concern? A. I don't know why it only was with those two witnesses but it was with only the two witnesses that my concern was.

Q. Interspersed between a witness that you didn't have that concern with? A. Mr. Roger Cossack, who presented records, yes.

Q. And it was only in the morning because in the afternoon when you had the witnesses, you no longer had that concern, so it's really about an hour broken by a 20-minute interval and then another hour and then that concern evaporates for the remainder of the investigation; is that your testimony? A. I don't know if that's a correct or proper characterization, it evaporates. I don't know if it evaporated or it was still there but—I mean, it had been a concern that there would have been someone that was trying to sell information. I didn't know if they had grand jury information or not, but it was a concern. In fact, it was so much of a concern that Jake Snyder and I referred it to the office of professional

(705) responsibility to take whatever steps that they felt they should to investigate the matter.

Q. When did you learn about this so-called leak or this so-called problem, this overriding concern? A. I believe it was in the beginning of November of 1981 we heard about it, and then in I guess the middle of November, there was more information. We didn't have that much information as to what actually occurred, but we received even more information and were told that the FBI—it had been referred or the FBI was conducting their investigation, and then I think at that time, in the middle of November, we also referred it to the office of professional responsibility.

Q. When did you refer it? A. I believe it was in the middle of November of 1981.

Q. Now, you were also out here in the February grand jury which was the following month, were you not? A. February 2nd, yes, sir.

Q. Did you conduct any examination on those occasions? A. I remember being present. I think the first witness that morning was Richard Birchall, February 2nd. His examination, a very short one, was conducted by Mr. Snyder. If you would refresh my recollection with the transcripts—I don't remember any other witnesses.

Q. There were a number of witnesses in February, Richard Birchall, Howard Gatliff— (706) A. Okay, Howard Gatliff I did examine.

Q. You did? A. Yes, I believe I did.

Q. Did you have a concern then or not about this leak? A. Oh, I'm sure I had a concern about the allegation.

Q. But not enough to impose secrecy obligations on Mr. Gatliff? A. I did not impose any secrecy obligations on Mr. Gatliff.

Q. In fact, you didn't do any other witness other than the two that we're talking about in this investigation? A. That's true.

Q. Did you examine any of the agents in this investigation? A. I think I—on one or two occasions I examined either Mr. Raybin or Mr. Mendrop or both, on separate occasions before the grand jury. I don't remember specifically when it was. It was a very limited number of—just for a question that the grand jury had or to provide a summary of certain documents that had been received by the grand jury.

Q. So you have some recollection that you examined Agent Mendrop on at least one occasion? A. Yes.

Q. And Agent Raybin on at least one occasion? A. Well, it may have been Mr. Mendrop on two occasions or—

Q. Okay. A. I don't have a specific recollection but I do remember examining Mendrop and maybe Raybin. I would have to refer to (707) the transcript.

Q. Any other agents that you can recall that you examined in the grand jury? A. The only other agent that probably I could have examined would have been a Roger Schneider but I don't think I did.

Q. You never conducted an examination of Special Agent Burke? A. No.

Q. Never conducted an examination of Special Agent Shea? A. No, sir.

Q. Now, you've reviewed the transcripts on April 6th and April 7th, 1982, have you not, in preparation for this? A. Yes, I've read those transcripts.

Q. Did you introduce Agent Burke to the grand jury on April 6th? Do you have a recollection of doing that? A. I do not have a recollection of actually introducing him to the grand jury on April 6th. I don't have a recollection of that.

Q. And you didn't ask him to introduce himself; that is, you didn't ask him to give his name and his occupation to the grand jury, did you, in April 6th? A. No, I did not.

Q. Were you present when he commenced reading with Agent— A. —Mendrop?

Q. Yes. A. I don't have a specific recollection of that grand jury (708) session. I probably would have been present at the beginning when they read the transcripts but I don't have a specific recollection of it, no.

Q. Well, let me ask you this. Based on your custom and practice, if you were in the grand jury room when the agents came in, wouldn't it have been your practice to identify the agents to the grand jury and explain what they were there for? A. Well, not necessarily, because Mr. Mendrop and Mr. Raybin had been before that grand jury and reading transcripts on a number of occasions prior to April 6, 1982. The grand jury were, those grand jurors were well aware of whom Mr. Mendrop and Mr. Raybin were.

Q. They didn't know who Mr. Burke was though, did they? A. At that time, that would have been Mr. Burke's first appearance before the grand jury.

Q. And wouldn't it have been your custom and practice to introduce agents who are assisting you in the investigation to introduce them to the grand jury? A. I would have probably introduced Mr. Burke as a special agent who would be reading transcripts with Mr. Mendrop.

Q. All right. So when you testified in response to Mr. Alexander's questions that you believe he was sworn on that occasion, you weren't even in the room, to the best of your recollection? A. All right, now, there may be two different occasions we're (709) talking about. I believe I testified that on April 7th—

Q. You testified on April 6th you believed he was sworn. You want to correct that testimony and say that you believe it was on April 7th? A. Well, I remember—I have a recollection of April 7th for sure, and I believe that he was sworn on April 6th, but I don't have a specific recollection of the April 6th reading.

Q. From your best recollection you're not even sure you were there when he— A. Like I said, I don't have a specific recollection of being present but I would have probably been there because, as you pointed out, it would have been my practice.

Q. So the probabilities were you weren't there because he was not introduced to the grand jury on April 6th before he commenced reading transcripts? A. I haven't stated that he was not introduced to the grand jury.

Q. I'm asking you if— A. I don't have a specific recollection of him being introduced to the grand jury but he probably would have been because I would have made a comment that, This is Special Agent Burke who will be reading transcripts with Mr. Mendrop. Now, whether or not that was picked up in the transcript, that's another matter.

Q. All right. So the transcript may be incorrect? (710) A. It may be very well incorrect.

Q. And on the morning of April 7th, do you have a recollection of introducing Agent Burke to the grand jury and identifying what they were going to do? A. Excuse me, sir. If I may be permitted to respond to that, to just add something on that last question, normally when we started off the grand jury investigation, the reporter would—or I mean a session—the reporter would say, Are you ready to go? And I would say, Yes, let's go. If there was any confusion and I had said, This is Special Agent Burke and Special Agent Burke and Mr. Mendrop are reading the transcripts and that wasn't picked up on the transcripts because the reporter wasn't going, I don't know, but in response to your question, it was my practice to introduce new special agents and, in all probability, I did, but I don't have a specific recollection of it.

Q. But you have a recollection of being there on the morning of April 7th? A. Yes, because Mr. Burke and Mr. Shea were both new to the grand jury in the sense that they were not Mr. Raybin and Mr. Mendrop, who had appeared a number of times, and I read the colloquy where after they testified I told the

grand jurors, we're finished with one and we'll read the next one later in the day, and I also have a recollection that that was the first time that I had heard that transcript that they were reading.

(711) Q. What do you mean it was the first time? A. Well, because it was part of the first grand jury which I was not part of.

Q. Well, I assume that everytime they read a transcript it was the first time somebody had heard it? A. No, because there were—I didn't read all of the grand jury transcripts from the first grand jury. I read selected ones, and this particular one I didn't. It's my recollection I had not read it and was hearing it for the first time of Mr. Snyder examining the witness.

Q. And you have a specific recollection of the foreman or deputy foreman administering an oath to them on that morning? A. It is my recollection that they were administered oaths prior to starting, yes, that morning.

Q. You have a specific recollection? You recall a deputy foreman or the forelady sitting there and swearing them in? A. I don't have a visual recollection of that but it is my recollection that they were sworn in, yes.

Q. And then you weren't there in the afternoon, as I understand it. A. That's correct, sir, I was not present during the reading of the grand jury transcripts in the afternoon.

Q. On that occasion, they just came in there by themselves and started reading? A. I believe I was there right when the grand jury was getting (712) settled and two agents were seated and I closed the door when they started, when they were to start their reading.

Q. What you're saying is the two agents came in and you left? A. They may have come in at the same time with me. I know that I was not present during the reading, but I think I was there right at the beginning because it's my practice to, when the grand jury came back from lunch, to be there with them, you know, and at least two agents would have been reading the tran-

script, but I did not stay and I don't remember their being sworn in at that time. I don't have a recollection of them reading transcripts.

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(739) *** Q. So you could have called him to the grand jury to testify? A. Yes, yes, we could have called Tom Waters. We did not call him to testify. Well, let me backtrack here. I remember there was a problem about having him testify before the grand jury. I believe that he was under investigation at that time and we could only go into certain limited questions, and his counsel may have refused to allow him to appear before the grand jury, I'm not certain on that. I don't know what was the reason. I know he did not testify before the grand jury, but I'd have to look at some notes or try to reconstruct it to determine why he did not go before the grand jury. There may have been a reason.

Q. Have you ever read a summary of any interview of Tom Waters? A. I believe I have, yes.

Q. And do you know who prepared that summary? I'm not asking who typed it. A. I would imagine—okay, there was a —I believe we may have prepared a summary of the interview and it would have been either—well, after indictment, sometime in the early part of '83, there was a meeting between Tom Waters, his attorney, myself, Jared Scharf and Rich Mendrop. This is after the (740) indictment.

Q. I'm asking you— A. Now, that was either prepared and typed up by myself, Mr. Scharf or Mr. Mendrop.

Q. What I'm asking for is was there ever a summary of what Mr. Waters had said in 1982 about meeting the president of the Bank of Nova Scotia at Mr. Kilpatrick's office? Do you ever recall seeing anything like that? A. If I could see some documents, I probably would remember it if it occurred, but as I told you, I don't—I think he was interviewed prior—I'm sure he was because we wouldn't have put on a cold witness at the contempt hearing,

but I don't have a specific recollection of it now so I wouldn't have a recollection of any memos or memorandum of interview.

Q. Do you recall during the course of the investigation that anybody interviewed Mr. Waters and learned from him that according to him he had met the president of the Bank of Nova Scotia at Mr. Kilpatrick's office? A. I had to have known—

MR. ALEXANDER: Objection, Your Honor, as to the relevancy in this proceeding as to what Mr. Waters did or didn't do in connection with the facts of the case.

MR. NESLAND: It has to do with the summary of Agent Mendrop in which he simply states that Tom Waters met the president of the Bank of Nova Scotia. He attributes it to (741) nobody, he doesn't identify where it came from, doesn't identify if it's hearsay, doesn't identify if the grand jury has heard testimony from Tom Waters, and if there is any other reasons necessary, Mr. Alexander, I can make them up.

MR. ALEXANDER: I would like to hear them instead of facetious remarks from counsel.

THE COURT: Well, let's not be too facetious. The objection is overruled. Go ahead.

THE WITNESS: Could you repeat that question?

(The last question was read back by the reporter.)

THE WITNESS: I had to have known that prior to putting Mr. Waters on the stand in the contempt hearing.

Q. (BY MR. NESLAND) But you did not participate in any interview of Mr. Waters by which you can recall learning that? A. I don't recall the interview that you're talking about and I must—I don't think I participated in any interview, or the interview that you're referring to, if the happened, but I must have, as I do with most of the witnesses unless they're just totally just documentary witnesses, must have had a pre-contempt hearing interview with Mr. Waters, maybe a short briefing, maybe it was the

same day of his testimony, but it would have been prior to his testimony at the contempt hearing.

Q. So what you're saying is you would have had some briefing period and— A. I would have.

(742) Q. —because you put Mr. Waters on the stand, you were responsible for his examination? A. Yes, I examined him on the stand, if I remember correctly.

Q. And he testified with respect to that issue; that is, that he testified that he recalled that he had met the president of the Bank of Nova Scotia? A. In substance, yes, he said that he was introduced to a person by Mr. Kilpatrick as being the president of the Bank of Nova Scotia.

Q. Did you show Mr. Waters any photographs to determine whether or not the person that he had met on that occasion was the president of the Bank of Nova Scotia? A. No, I didn't. I remember him describing that person, though. I think this is bringing it back. I think I have read a memorandum where Mr. Waters describes the person who he met, was introduced as the Bank of Nova Scotia's president, as wearing funny clothes, sort of outlandishly dressed, and with shoes that had tassels on them or something like that. I believe that's in a memorandum and I've read that memorandum before and I don't remember where—what particular interview that is referring to, it referred to.

Q. Do you know whether, during the course of the investigation, there was any investigation made to determine whether or not the person described by Mr. Waters reasonably compared to the president of the Bank of Nova Scotia or the purported president, (743) Monty Smith, who was being referred to? A. In fact, that was one of the things that we looked into because I believe there was a discrepancy as to his description of this person that he had been introduced to as the Bank of Nova Scotia's president and a photo that was in some Cayman journal, business journal,

of Monty—let's see, I think it was Monty Smith—there was a picture in it.

Q. They didn't appear to be the same people? A. There was a real question as to whether or not it was the same person.

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CROSS EXAMINATION
BY MR. WALLER

(802) *** Q. How many grand jury investigations have you conducted or assisted in conducting? **[Prosecutor Thomas Blondin]** A. Prior to the Kilpatrick grand jury investigation?

Q. Yes. A. One.

Q. And how many since the Kilpatrick grand jury investigation? A. Let me expand upon my answer on one—I've presented a number of cases to grand jury for indictment in our normal case with cases authorized for prosecution and you bring in a special agent to present the case and you may call a witness, like an accountant or one of the employees, but it's not a full-blown grand jury investigation. Normally, prior to the Kilpatrick, I was involved in one, what I would consider, grand jury investigation, but I presented a number of cases before the grand jury. Subsequent to that and during the Kilpatrick investigation, I was involved in a number of grand jury investigations; probably, I don't know, more than ten, I guess.

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RE-DIRECT EXAMINATION
BY MR. ALEXANDER

(1067) *** Q. Now, sir, with regard to the presence or not of Mr. Monty Smith in Denver, do you recall testifying about that incident, with regard to June of '79, that Mr. Waters met Mr. Smith in Denver? Is my recollection correct on that?

[Prosecutor Thomas Blondin] A. Yes, I believe it was cross-examination by Mr. Nesland. He was asking about Mr. Monty Smith being present in Denver, Colorado in June of 1979.

Q. And you testified at one point in time that there was a question as to the identity, a real question, I believe you said, as to the identity of Monty Smith, did you not? A. Yes.

Q. Now, with relationship—strike that. When was the indictment returned in this case? A. September 30, 1982.

Q. Now, using the indictment as a point of time or reference point, when did the question arise in your mind from a time standpoint before the indictment or after the indictment as to whether or not there was a question as to the identity of Monty Smith? A. Several months prior to the indictment.

Q. And then what, if anything, did you do or direct the agents to do in connection with this question that you had, sir? A. I directed Paul Raybin and Rich Mendrop to assemble all (1068) information concerning this incident and to do further investigation to corroborate Mr. Waters' statement that he met Monty Smith in Denver, Colorado in June of 1979.

Q. And what did they do, sir, do you recall? A. They did assemble the information that we had in our files and I believe it was Rich Mendrop contacted Tom Waters and conducted an interview. This would have been on about September 15, I believe, 1982, and Paul Raybin also contacted a Raul Ros and obtained information concerning this event.

Q. Was this incidentally the second interview of Mr. Waters? A. Yes, the first interview of Mr. Waters was a telephone interview by Mr. Mendrop in February of 1982.

Q. All right, sir, and then subsequently there was a further interview? A. There was, yes. This was the second or third interview of Mr. Waters.

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CROSS EXAMINATION
BY MR. RUTNER

(1122) **[Prosecutor Scharf]** THE WITNESS: Your Honor, I remember the third reason, in response to Mr. Nesland's question, as to why I didn't believe there was a *Massiah* violation.

THE COURT: Okay, go ahead.

THE WITNESS: Because *Massiah* says it's not a violation. Even if I had interviewed indicted defendants, according to *Massiah* and the cases that follow it, that's not a violation. *Massiah* and those cases only hold that you cannot use that statement againt the defendant, but they do not state that it's misconduct or error and no indictment has ever been dismissed because of it, and in the Tenth Circuit you're permitted to use such statements to impeach a defendant's testimony, and I'm referring to the *McManaman*, M-c-M-a-n- a-m-a-n, case.

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(1137) *** Q. Mr. Scharf, with your knowledge, limited as it may be as to what's gone on during these proceedings in the last five months, is it still your opinion that the matters being printed here are silly and frivolous? A. Absolutely. I don't think you've proved one thing. I think you've proved two things and that is that—

Q. Thank you, Mr. Scharf. A. —those charges are silly and frivolous. If they were proved they wouldn't be silly and frivolous, but you haven't proved one thing.

Q. Thank you.

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(1175) *** THE COURT: That's all right, I'm not picky about that, but as I recall the testimony of the I.R.S. special agents, they have emphatically denied turning over grand jury material to the civil branch and I haven't seen any evidence yet

that says that that indeed was done. I've heard a lot of denials. Now are you laying a foundation for this, is that what you're trying to do?

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AS INDICATED ON THE DOCKET, VOLUME II OF THE JOINT APPENDIX WAS SEALED BY THE COURT AND CONSEQUENTLY IS NOT AVAILABLE FOR MICROFILMING

No. 87-578-CFY
Status: GRANTED

Title: The Bank of Nova Scotia, Petitioner
v.
United States

Docketed:
October 9, 1987

Court: United States Court of Appeals
for the Tenth Circuit

Vide:
87-602

Counsel for petitioner: Pennell,William B.

Counsel for respondent: Solicitor General

NOTE* Stay of Mandate by USCA 10 issued on to & inc. 10/12/87

Entry	Date	Note	Proceedings and Orders
1	Oct 9 1987	G	Petition for writ of certiorari filed.
3	Nov 10 1987		Order extending time to file response to petition until December 14, 1987.
4	Dec 14 1987	X	Brief of respondent United States in opposition filed. VIDED.
5	Dec 16 1987		DISTRIBUTED. January 8, 1988
6	Dec 24 1987	X	Reply brief of petitioner The Bank of Nova Scotia filed.
7	Jan 11 1988		Petition GRANTED. limited to Question 1 presented by the petition. The case is consolidated with 87-602, and a total of one hour is allotted for oral argument.
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9	Feb 25 1988		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed. VIDED.
12	Feb 25 1988		Brief of petitioner The Bank of Nova Scotia filed.
13	Feb 25 1988		Joint appendix filed. VIDED.
14	Feb 25 1988		Brief amici curiae of ACLU, et al. filed. VIDED.
10	Feb 26 1988	G	Motion of petitioners for leave to file portion of joint appendix under seal filed.
8	Feb 27 1988		Record filed.
		*	Certified copy original record and proceedings - 3 boxes- Box 1 rec'd 2-26-88, box 2 & 3 rec's 2-27. (Sealed).
11	Feb 29 1988		DISTRIBUTED. March 4, 1988. (Above motion to file portion of joint appendix under seal).
15	Mar 7 1988		Motion of petitioners for leave to file portion of joint appendix under seal GRANTED.
16	Mar 10 1988	D	Motion of petitioners for divided argument filed.
18	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 27, 1988. (1st case). This case is consolidated with 87-602. 1 hour.
17	Mar 21 1988		Motion of petitioners for divided argument DENIED.
19	Mar 28 1988		Brief of respondent United States filed. VIDED.
20	Mar 31 1988		CIRCULATED.
21	Apr 20 1988	X	Reply brief of petitioner The Bank of Nova Scotia filed.
22	Apr 27 1988		ARGUED.